Docket for 02-1080

No. 02-1080	Status: ARGUED
Title:	General Dynamics Land Systems, Inc., Petitioner
	v.
	Dennis Cline, et al.
Docketed:	January 21, 2003
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(00-3468)
Decision Date:	July 22, 2002
Rehearing Denied:	September 19, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 2 2002	Application (02A468) to extend the time to file a petition for a writ of certiorari from December 18, 2002 to January 17, 2003, submitted to Justice Stevens.
Dec 6 2002	Application (02A468) granted by Justice Stevens extending the time to file until January 17, 2003.
Jan 16 2003	Petition for writ of certiorari filed. (Response due February 20, 2003)
Feb 11 2003	Order extending time to file response to petition to and including March 24, 2003.
Mar 21 2003	Brief of respondents Dennis Cline, et al. in opposition filed.
Mar 21 2003	Motion for leave to file amicus brief filed by Equal Employment Advisory Council, et al.
Mar 24 2003	Motion for leave to file amicus brief filed by Central States, SE and SW Areas Health and Welfare Fund.
Apr 1 2003	Reply of petitioner General Dynamics Land Systems, Inc. filed.
Apr 21 2003	Motion for leave to file amicus brief filed by Equal Employment Advisory Council, et al. GRANTED.
Apr 21 2003	Motion for leave to file amicus brief filed by Central States, SE and SW Areas Health and Welfare Fund GRANTED.
Apr 21 2003	Petition GRANTED.
May 6 2003	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
May 16 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 30, 2003.
May 29 2003	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for the respondents.
Jun 13 2003	Further extension of time to file the joint appendix and petitioner's brief on the merits to and including July 7, 2003.
Jul 7 2003	Brief amicus curiae of AARP filed.
Jul 7 2003	Brief of petitioner General Dynamics Land Systems, Inc. filed.
Jul 7 2003	Joint appendix filed.
Jul 7 2003	Brief amicus curiae of Central States, SE and SW Areas Health and Welfare Fund filed.
Jul 7 2003	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Jul 7 2003	Brief amicus curiae of National Education Association filed.
Jul 7 2003	Brief amicus curiae of AFL-CIO filed.
Jul 7 2003	Brief amicus curiae of Erisa Industry Committee filed.
Aug 5 2003	Extension of time within which to file respondents' brief on the merits to and including August 25, 2003.

Aug 19 2003	CIRCULATED.
Aug 19 2003	SET FOR ARGUMENT Wednesday November 12, 2003.
Aug 20 2003	Further extension of time within which to file respondent's brief on the merits to and including August 29, 2003.
Aug 29 2003	Brief of respondents Dennis Cline, et al. in opposition filed.
Aug 29 2003	Brief amicus curiae of the United States filed.
Aug 29 2003	Record received from the U.S.C.A. for the 6th Circuit. (1 Binder)
Sep 8 2003	Record received from the U.S.D.C. for the Northern District of Ohio, W. Div. (1 envelope)
Sep 10 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 1 2003	Reply of petitioner General Dynamics Land Systems, Inc. filed. (distributed).
Oct 6 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 12 2003	Argued. For Petitioner: Donald B. Verrilli, Jr. For Respondent: Mark W. Biggerman; and on behalf of the United States, as amicus curiae, Paul D. Clement, Acting Solicitor General, Department of Justice, Washington, DC.

(1)

Supreme Court, U.S.
FILED

021080 JAN 16 2003

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,

Petitioner,

v.

DENNIS CLINE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
WILLIAM M. JAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner

QUESTION PRESENTED

Whether the Court of Appeals erred in holding, contrary to decisions of the First and Seventh Circuits, that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, prohibits "reverse discrimination," *i.e.*, employer actions, practices, or policies that treat older workers more favorably than younger workers who are at least 40 years old.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were plaintiffs-appellants in the court below and are respondents in this Court: John Alge, David Bayes, Gary Bish, Dan Brenamen, Lewis Browning, Anthony Ciminillo, Scott Danner, Hixey Deeble, Robert Dewald, Larry Dicke, Richard Dirmeyer, David Driggs, Ron Duran, Kenneth Emahiser, Donald Eversole, Earl Fast, Dennis Ferguson, Robert Feucht, William Fisher, Steven Flake, Vada Flinders, Robert Frye, Gregory Gebolys, Joseph Gibson, Robert Greenlee, Raymond Gourash, Steven Hammond, Nathan Heckathorn, David Hollon, Charles Huff, Gary Huff, Richard Huffman, Anthony King, Les Krotzer, Robert Kuhn, Gerald Lanning, David Laurence, William Legrant, Charles Lowery, Donald Mathias, Gregory Mayberry, Steven Mays, John McClellan, Danny McEowen, Stan Miller, James Munson, Vincent Napier, Robert Nye, Clayton Pitts, Dennis Powers, Eliseo Ramierz, John Rammel, James Reese, Leonard Risner, Patrick Roddy, Tom Saylor, John Schlosser, David Seibert, Marvin Shepherd, M.J. Shields, Doug Sipe, David Spires, Larry Stark, Kenny Stevens, Michael Strahm, Anthony Stubbs, Russ Theil, Thomas Tucker, Charles Wagner, Harley Wagner, John Wagner, Gregory Walters, Robert Waltermyer, Charles Wood, Michael Woodruff, Allan Young, Kyle Young, Rick Young, Robert Baker, Dean Becker, Gary Salyer, Daryl Beaupre, Terry Gibbs, Jon Cottrell, Terry Biddle, John Birkmeier, Margaret Boyd, Guy Burrows, Russell Clewley, Thomas Clifton, Daniel Cline, Jed Couts, James Culp, Sandra Daniel, Michael Deal, Dana DeCamp, Richard Diltz, Steven Freed, Daniel Geething, Patrick Goddard, Frank Guerrero, Alan Haunhurst, Robert Horning, Scott Hesse, Michael Hunsicker, Loren Hurless, Joanna Jacobs, Bobby Jordan, Bob Keiffer, Richard Kessler, Paul Kesner, Douglas Kraepel, Gary Lamberjack, David Luchini, Lester Lyons, Joella Marks, Jeffrey Martin, Kenneth

McCaslin, Robert McDonald, Robert Millirans, Jeffrey Monroe, Joseph Myers, Steven Myers, John Nekoranec, Wayne Nestor, Paul Niese, Mike Nino, Ronald Perrine, Charles Radloff, Mark Rex, Michael Rigsby, Bruce Rose, Dennis Schimmoeller, Michael Shultz, Sandy Snider, Larry Sutton, Cecil Turnbell, Ralph Wheeler, Robert White, Daniel Wilges, Robert Wilkins, Leonard Wilson, Richard Wright, Martin Zamudio, Emery Koszoru, Robert Beck, Donald Kime, David Pigga, Anthony Durkin, Richard Jackson, Thomas Kraycer, William Simson, Harry Baldan, Thomas Degrafenried, Leo Brunori, Delmar Weikel, Eugene Fisher, John Jerome, James Ferraro, Pete Borkowski, Kevin Parker, Michael Pisarski, Joseph Slakis, Boyd Smith, Vincent Cesari, Daniel Buranich, John Roszko, Gary Morcom, Stanley Homitz, Joseph Erzar, Dennis Kobierecki, John Wargo, Paul Debish, James Swartz, Peter Rosar, George Sansky, Patrick Rosemellia, Robert Clark, George Archibald, Thomas Earyes, Stanley Cominsky, Juleann Kurchin, James Clark, Keith Winkler, Ted Anaszeuski, John Manko, Ronald Kennedy, Thomas Babb, Roger Pool, Gary Rhodes, Ronald Mitchem, Jim Welly, David Dillon, Leonard Haaser, Ed Galan, David Puchta, Michael Lucius, Mario Diaz, Dennis Ryan, and Michael Williams.

RULE 29.6 STATEMENT

Petitioner is a subsidiary of General Dynamics Corporation, a publicly traded company. No corporation owns more than 10 percent of the stock of General Dynamics Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

I. Factual Background 3

II. Proceedings In The District Court 4

III. Proceedings In The Court Of Appeals 5

REASONS FOR GRANTING THE WRIT 7

I. Review Is Warranted Because The Lower Federal Courts Are Divided Over The Question Whether Reverse Discrimination Is Actionable Under the ADEA 8

II. The Ruling Below Is Inconsistent With Decisions Of This Court 12

III. The Ruling Below Is Inconsistent With Congressional Purpose And Intent 13

IV. The Question Presented Is An Important And Recurring One, And The Burdensome Impact Of The Decision Below Necessitates This Court's Review 19

CONCLUSION 23

APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit, filed July 22, 2002 ..... 1a

APPENDIX B: Memorandum Opinion of the United States District Court for the Northern District of Ohio, filed March 10, 2000 ..... 21a

APPENDIX C: Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing En Banc, filed September 19, 2002 ..... 26a

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir.), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed*, 122 S. Ct. 1290 (2002) 21

Bergen Commercial Bank v. Sisler, 723 A.2d 944 (N.J. 1999) 17

Brown v. Duchesne, 60 U.S. (19 How.) 183 (1857) 14

Conn v. First Union Bank of Virginia, Civ. Action No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242 (W.D. Va. Mar. 17, 1995) 19

Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989) 14

Dittman v. General Motors Corp.-Delco Chassis Division, 941 F. Supp. 284 (D. Conn. 1996), *aff'd on other grounds*, No. 96-9442, 1997 WL 340267 (2d Cir. June 20, 1997) 10

Edwards v. Board of Regents of the University of Georgia, 2 F.3d 382 (11th Cir. 1993) 19

EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999) 22

EEOC v. Wyoming, 460 U.S. 226 (1983) 12, 15

Finch v. Hercules Inc., 865 F. Supp. 1104 (D. Del. 1994), *aff'd mem.*, 124 F.3d 186 (3d Cir. 1997) 22

Graffam v. Scott Paper Co., 848 F. Supp. 1 (D. Me. 1994), *aff'd on other grounds*, No. 95-1046, 1995 WL 414831 (1st Cir. July 14, 1995) 22

Greer v. Pension Benefit Guaranty Corp., No. 00 CIV 1272 SAS, 2001 WL 137330 (S.D.N.Y. Feb. 15, 2001).....19

Griggs v. Duke Power Co., 401 U.S. 424 (1971).....21

Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992).....5, 7, 9, 14

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).....12, 13, 15, 21

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996).....21, 22

Mississippi Power & Light Co. v. Local Union Nos. 605 & 985, IBEW, 945 F. Supp. 980 (S.D. Miss.), *aff'd mem.*, 102 F.3d 551 (5th Cir. 1996).....11

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), ...6, 11, 12, 13

Ogden v. Bureau of Labor, 699 P.2d 189 (Or. 1985) (in banc).....17

Parker v. Wakelin, 882 F. Supp. 1131 (D. Me. 1995), *aff'd in part and rev'd in part on other grounds*, 123 F.3d 1 (1st Cir. 1997).....10

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989).....19

Ratzlaf v. United States, 510 U.S. 135 (1994).....16

Rowland v. California Men's Colony, 506 U.S. 194 (1993).....17

Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988).....5, 10

Skalka v. Fernald Environmental Restoration Management Corp., 178 F.3d 414 (6th Cir. 1999).....22

Stafford v. Briggs, 444 U.S. 527 (1980).....14

Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995)...10, 19

Sullivan v. Stroop, 496 U.S. 478 (1990).....16

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 15

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 11-12

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).....15

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 15

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 17

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 21

Wehrly v. American Motor Sales Corp., 678 F. Supp. 1366 (N.D. Ind. 1988) 11, 20

Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 15

Zanni v. Medaphis Physician Services Corp., 612 N.W.2d 845 (Mich. Ct. App. 2000) (limited en banc) 17

Statutes and Rules

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

ADEA § 2, 29 U.S.C. § 621 ..... 1-2, 5, 6, 7, 9, 14

ADEA § 2(a), 29 U.S.C. § 621(a) 9

ADEA § 2(a)(1), 29 U.S.C. § 621(a)(1).....2, 3, 15

ADEA § 2(a)(2), 29 U.S.C. § 621(a)(2).....2, 3, 15

ADEA § 2(a)(3), 29 U.S.C. § 621(a)(3).....2, 3, 15

ADEA § 2(b), 29 U.S.C. § 621(b) 2, 16
ADEA § 4(a), 29 U.S.C. § 623(a) 2
ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1) 5, 6, 7, 15
ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) 20
ADEA § 4(*l*), 29 U.S.C. § 623(*l*) 20
ADEA § 12(a), 29 U.S.C. § 631(a) 3, 4
29 C.F.R. § 1625.2(a) 6, 18

Other Authorities

Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 90th Cong. (1967) 18

AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1993) 14

H.R. REP. No. 90-805 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213 ..... 16, 18

Special Message to the Congress Proposing Programs for Older Americans, 1 PUB. PAPERS 32 (Jan. 23, 1967) 17

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner General Dynamics Land Systems, Inc. ("General Dynamics"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 296 F.3d 466 (6th Cir. 2002). The opinion and order of the United States District Court for the Northern District of Ohio granting petitioner's motion to dismiss (App., *infra*, 21a-25a) is reported at 98 F. Supp. 2d 846 (N.D. Ohio 2000).

JURISDICTION

The district court had federal question jurisdiction over the plaintiffs' claims under the Age Discrimination in Employment Act of 1967 ("ADEA" or "the Act") pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on July 22, 2002. General Dynamics filed a timely petition for rehearing, which the court of appeals denied on September 19, 2002. App., *infra*, 26a-27a. On December 6, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 17, 2003. *See* Application No. 02A468. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The ADEA's statement of findings and purpose, § 2 of the Act, provides in pertinent part:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . .

* * *

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621.

The ADEA's nondiscrimination provision, § 4(a) of the Act, provides in pertinent part:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

29 U.S.C. § 623(a).

The ADEA's age limitation, § 12(a) of the Act, provides:

The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.

29 U.S.C. § 631(a).

STATEMENT OF THE CASE

Congress adopted the ADEA in order to protect "older workers" against arbitrary discrimination arising out of invalid stereotypes about the presumed impact of aging on workplace performance. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3). The Act was intended to combat the discriminatory effect of such stereotypical views, which Congress deemed responsible for the fact that unemployment was, "*relative to the younger ages*, high among *older workers*." *Id.* § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphases added).

In the decision below, a divided Sixth Circuit panel departed from this settled understanding of the ADEA and held, contrary to decisions of two other courts of appeals, that the ADEA forbids employers to treat older employees *more* favorably than their younger co-workers. The court of appeals' divergence from the text and purpose of the ADEA exacerbates a conflict among the federal courts and is inconsistent with this Court's decisions. Moreover, the decision below will impose serious and unwarranted new burdens, both on the older workers whose opportunities the Act was intended to secure and on the employers who seek to extend those opportunities without subjecting themselves to vexatious litigation. Review by this Court is necessary to avert these negative consequences of the Sixth Circuit's erroneous interpretation of the ADEA.

I. Factual Background

General Dynamics operates manufacturing plants at Lima, Ohio, and Scranton, Pennsylvania, at which the em-

ployees are represented by the United Auto Workers ("UAW"). This litigation arises from two collective bargaining agreements negotiated between General Dynamics and UAW. The agreement in force until mid-1997 ("CBA1") provided full health benefits to all employees who retired with 30 years' seniority. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement ("CBA2"), which ended the practice of providing health benefits to all retirees effective July 1, 1997. Instead, CBA2 offered retiree health benefits only to those employees who were at least 50 years old as of July 1, 1997. App., *infra*, 3a.

Respondents are present and former employees of General Dynamics who were at least 40 but not yet 50 years old on July 1, 1997. *Id.* Respondents are therefore within the ADEA's protected class, which includes workers over 40. ADEA § 12(a), 29 U.S.C. § 631(a). Each of the respondents had qualified or could potentially have qualified for retiree health benefits under CBA1, but was ineligible for such benefits under CBA2. App., *infra*, 3a.

II. Proceedings In The District Court

Respondents filed a putative class action against General Dynamics in the United States District Court for the Northern District of Ohio. App., *infra*, 2a-3a, 21a. Respondents alleged that CBA2's limitation of retiree health benefits to employees over 50 amounted to age discrimination, and they sought damages under the ADEA and state law. *Id.* at 22a.

The district court granted General Dynamics' motion to dismiss. App., *infra*, 21a-25a. Because respondents' suit stemmed from the fact that they were too *young* to receive health benefits under CBA2, the district court observed that their ADEA claim was an assertion of "'reverse discrimination[,]' whereby older workers receive favorable treatment relative to younger workers." *Id.* at 23a. The court determined at the outset that respondents' complaint would stand

or fall based on whether reverse discrimination claims are cognizable under the ADEA. *Id.* at 23a-24a. Thus, the dispositive question before the court was whether the ADEA precluded General Dynamics from excluding respondents from the new retiree health insurance plan on the basis of their relative youth, in comparison to older employees who retained retiree health benefits under CBA2. *Id.* at 24a.

The district court held that reverse discrimination is not actionable under the ADEA. The court reasoned that the congressional purpose in enacting the ADEA was to "address the problems faced by *older* workers" by giving them a remedy for the discrimination they faced, not to prevent employers from affording those older employees more favorable treatment than other workers within the Act's over-40 protected class. App., *infra*, 24a. The district court also noted that "[e]very federal court to have addressed the issue has held that a claim of reverse age discrimination is not cognizable under ADEA." *Id.* Accordingly, the court dismissed respondents' complaint for failure to state a claim. *Id.*

III. Proceedings In The Court Of Appeals

Respondents appealed, and a divided panel of the Sixth Circuit reversed. App., *infra*, 1a-20a. Relying on what it termed the "plain" language of the statute, the court held that the only possible construction of the ADEA's operative provision, § 4(a)(1), bars basing employment decisions on chronological age in any way, insofar as those decisions affect workers older than 40. *Id.* at 6a-7a. The court of appeals accordingly refused to give weight to the congressional findings and declarations of policy contained in § 2 of the ADEA, which make clear that Congress intended to prohibit discrimination against "*older* workers." *See id.* at 8a-9a. The court acknowledged that its conclusion ran contrary to decisions of the First and Seventh Circuits, *id.* at 6a-7a (citing *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.); *Hamilton v. Caterpillar, Inc.*, 966 F.2d

1226, 1228 (7th Cir. 1992)), and "the majority of courts to consider the question." *Id.* Nonetheless, the court below opined that "we do not find the reasoning undergirding these opinions persuasive." *Id.* at 7a.

The court of appeals repeatedly stated that it was relying only on the "plain" language of § 4(a)(1), which it declared was controlling over any more general provision like the congressional findings and declarations set forth in § 2. The court also asserted, however, that its conclusion would be the same even if it looked to those provisions. App., *infra*, 8a-9a. Moreover, the court noted that the Equal Employment Opportunity Commission ("EEOC") had promulgated a regulation interpreting the ADEA to prohibit reverse discrimination against members of the protected class. *Id.* at 10a (citing 29 C.F.R. § 1625.2(a)). The court of appeals did not rely on that regulation as controlling authority, but stated that it found the EEOC's interpretation to be a "true rendering" of the ADEA's language. *Id.*

Judge Cole concurred, writing separately to note his discomfort with the "counterintuitive" result reached by the opinion he joined and his "serious doubts" that the majority's holding accorded with Congress's intent in enacting the ADEA. App., *infra*, 18a, 12a. Judge Cole also conceded that the majority's decision was in "implicit tension" with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which held that a prima facie case of age discrimination under the Act includes a showing that the challenged employer action favored a person "substantially younger" than the plaintiff. *Id.* at 16a-17a (citing *O'Connor*, 517 U.S. at 313). Judge Cole stated that although *O'Connor*'s adoption of a "substantially younger" test "suggests that reverse age discrimination claims are not permitted under the ADEA," he was confident that this Court would reformulate the test to require a "substantial difference in age" instead. *Id.* at 17a-18a.

Judge Williams dissented. App., *infra*, 18a-20a. Noting that the panel majority stood virtually alone in its construction of the Act to permit reverse discrimination suits, he stated that he would have followed the holding of the Seventh Circuit, in the leading case expounding the majority view, that "the ADEA does not protect the young against the old, or even, we think, the younger *against* the older." *Id.* at 18a-19a (quoting *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1227 (7th Cir. 1992)) (citation omitted). He reasoned, as did the Seventh Circuit, that "age discrimination cannot be reversed as can sex or race discrimination because '[a]ge is not a distinction that arises at birth. Nor is age immutable.'" *Id.* at 19a (quoting *Hamilton*, 966 F.2d at 1227) (alteration in original). Although he thought there might be "room for argument" over the meaning of § 4(a)(1) considered in isolation, he stated that such ambiguity could and should be resolved by referring to the statement of findings and purpose in § 2 of the ADEA, 29 U.S.C. § 621. *Id.* That provision's repeated references to "older workers" and "older persons," he wrote, make clear "Congress's intent to prohibit employers from discriminating against older workers, as opposed to younger ones." *Id.*

Judge Williams also pointed out that the majority's decision threatened to upset the age-based benefit and early retirement programs that collective bargaining agreements across the country have established, in recognition of the fact that "a 50-year-old worker may need more protection or more benefits than a 40-year-old worker." *Id.* The inevitable result of the majority's contravention of this "common sense understanding" of benefits negotiation, he warned, would be that "bargaining for all workers, regardless of age, [will] suffer." *Id.*

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding that reverse discrimination is cognizable under the ADEA is squarely contrary to the deci-

sions of virtually every other court to consider the question, including the First and Seventh Circuits, and is in direct tension with this Court's precedents. Moreover, the decision below is clearly wrong, and works in polar opposition to Congress's purpose in adopting the ADEA. The Act was expressly intended to combat discrimination against "older workers" and to eradicate stereotypical views that disadvantage those employees who are relatively older than others in the workplace. The court of appeals' counterintuitive conclusion that the ADEA permits *younger* employees to challenge the beneficial treatment of *older* workers is nothing short of absurd, and runs directly counter to the clear meaning and intent of the ADEA.

The decision below poses a direct threat to employers' reasonable efforts to facilitate older workers' securing, retaining, or re-entering productive employment and to provide appropriate but cost-effective benefits packages responsive to the needs of older employees. In addition, the rule adopted by the court below threatens to make dramatically more burdensome the litigation of conventional age discrimination claims. The question presented is clearly one of recurring importance, and the Sixth Circuit's decision creates an intolerable dilemma for nationwide employers like petitioner, who are now obligated to conform their conduct to widely varying interpretations of the ADEA in different jurisdictions across the country. This Court should forestall these adverse consequences by granting certiorari to resolve the acknowledged circuit split created by the Sixth Circuit's deeply flawed construction of the ADEA.

I. Review Is Warranted Because The Lower Federal Courts Are Divided Over the Question Whether Reverse Discrimination Is Actionable Under The ADEA

The decision below creates a clear circuit split over the question whether the ADEA precludes the adoption of policies that favor older workers over younger workers. The

Sixth Circuit's holding is diametrically opposed to other decisions addressing the same issue on almost precisely the same facts. The decision below thus cannot be reconciled with the weight of authority holding that reverse discrimination is not actionable under the ADEA.

Indeed, as noted above, the Sixth Circuit correctly acknowledged that its holding was directly contrary to the Seventh Circuit's decision in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992). The facts of that case are virtually identical to those presented here: In the course of labor negotiations, Caterpillar agreed that in the event of a plant closing, it would establish a retirement benefit program open only to workers at least 50 years of age with at least 10 years of service. When the program took effect, a class of 40- to 49-year-old employees with the requisite ten years' seniority brought suit under the ADEA. *Id.* at 1227.

The *Hamilton* court rejected the ADEA claim as proceeding from a faulty premise. Age discrimination, the court explained, is not a distinction that "cuts both ways," like race or sex discrimination; age is neither an inborn characteristic nor an immutable one. *Id.* Moreover, "[t]here is nothing to suggest that Congress believed age to be the equal of youth in the sense that the races and sexes are deemed to be equal." *Id.* To the contrary, "[i]f the Act were really meant to prevent reverse age discrimination, limiting the protected class to those 40 and above would make little sense." *Id.* This interpretation of the Act was further bolstered by Congress's findings and statement of legislative purpose in § 2 of the Act, which make clear that Congress intended to address "the problems faced by 'older workers' and 'older persons.'" *Id.* at 1228 (quoting 29 U.S.C. § 621(a)). As the Seventh Circuit explained, "There is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young*." *Id.* Accordingly, the Seventh Circuit held that

"[t]he ADEA does not provide a remedy for reverse age discrimination." *Id.*

As the court below acknowledged, App., *infra*, 7a, its holding is also inconsistent with the First Circuit's decision in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988) (Breyer, J.). In *Schuler*, the court considered an ADEA claim by a worker who claimed that he had been forced into retirement on account of his age. He based his claim in part on the company's development of a severance plan that his supervisor encouraged him to accept (and that he ultimately did accept). *Id.* at 277-78. In an opinion by then-Judge Breyer, the First Circuit held that Schuler could not make out a claim of age discrimination based on the terms of the severance plan. Although the plan "offered greater benefits to those with more seniority," the court held that the ADEA "does not forbid treating older persons *more* generously than others." *Id.* at 278 (emphasis in original).[1]

As these decisions demonstrate, the courts of appeals are now sharply divided over the question presented in this petition. The conflict extends beyond the circuit court level as well; the numerous decisions of district courts that have considered the question have reached divergent results, with the majority holding that reverse discrimination is not actionable under the ADEA.[2] This Court's review is necessary to re-

---

[1] The Ninth Circuit has also noted its skepticism regarding the notion of a reverse age discrimination claim, without deciding the issue. *See Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995).

[2] *Compare, e.g., Dittman v. Gen. Motors Corp.-Delco Chassis Div.*, 941 F. Supp. 284, 287 (D. Conn. 1996) (holding that reverse discrimination is not actionable under the ADEA), *aff'd on other grounds*, No. 96-9442, 1997 WL 340267 (2d Cir. June 20, 1997); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140 (D. Me. 1995) (same), *aff'd in part and rev'd in part on other grounds*, 123 F.3d 1 (1st Cir. 1997); *and Wehrly v. Am. Motor Sales Corp.*, 678 F. Supp. 1366, 1381-82 (N.D. Ind. 1988) (same), *with Miss. Power & Light Co. v. Local Union Nos. 605 & 985, IBEW*, 945 F. Supp. 980, 985 (S.D. Miss.) (holding that reverse discrimination is actionable under the ADEA), *aff'd mem.*, 102 F.3d 551 (5th Cir. 1996).

solve the conflict and provide a clear rule to guide federal and state courts considering the viability of reverse discrimination claims by employees covered by the ADEA.

II. The Ruling Below Is Inconsistent With Decisions Of This Court

In addition to creating a conflict with numerous decisions of the lower federal courts, the Sixth Circuit's decision in this case is also at odds with this Court's precedents. For this reason as well, plenary review is warranted.

In his concurring opinion below (App., *infra*, 16a), Judge Cole forthrightly and correctly noted the "implicit tension" between the rule the panel majority adopted and this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In *O'Connor*, this Court addressed the question whether an ADEA plaintiff's prima facie case must include proof that the employee who was preferred over the plaintiff was outside the protected age group altogether. The Court held that a plaintiff need not show that his or her replacement was younger than 40, *i.e.*, entirely outside the Act's protected class. Rather, it was sufficient for the plaintiff to establish that the replacement was "substantially younger than the plaintiff." *O'Connor*, 517 U.S. at 313. The Court premised its "substantially younger" test on the need for a "logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" *Id.* at 311-12 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*,

450 U.S. 248, 254 n.7 (1981)). Thus, this Court did not formulate the "substantially younger" requirement arbitrarily, but instead did so in light of the underlying discrimination that the Act forbids and for which the ADEA prima facie case is intended to serve as a proxy, *i.e.*, discrimination against *older* workers based on their relatively advanced years.

The decision below cannot be reconciled with the test adopted in *O'Connor*. If, as the *O'Connor* Court held, an ADEA plaintiff cannot even make out a prima facie case absent proof that the preferred employee was "substantially *younger*" than the plaintiff, it necessarily follows that the ADEA does not proscribe employer policies that favor *older* workers over those "substantially younger." Judge Cole's blithe assumption that this Court did not mean what it said in *O'Connor* is no substitute for adherence to binding precedent. The panel's failure to give effect to the clear import of *O'Connor* merits this Court's review.

The decision below also runs counter to the reasoning adopted by this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In that case, this Court explained that Congress enacted the ADEA to eradicate the "inaccurate and stigmatizing stereotypes" that were causing "older workers" to be deprived of opportunities for employment, and that the "very essence of age discrimination" prohibited by the Act is "for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Id.* at 610. As the *Hazen Paper* Court took pains to reiterate, the ADEA encapsulates Congress's recognition that age discrimination, unlike other forms of disparate treatment such as race and sex discrimination, largely stems not from "animus" but from "stereotypes unsupported by objective fact" about the continued ability of "older workers." *Id.* at 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)) (internal quotation marks omitted). Thus, the "prohibited stereotype[s]" that the ADEA seeks to eliminate are those that are adverse to "[o]lder employees." *Id.* at 612. Accordingly, when employers instead extend *more favorable* treatment to "older workers," the problem addressed by Congress in the ADEA is simply not present.

O'Connor and *Hazen Paper* both teach that the ADEA seeks to remedy a specific societal ill. Its primary aim is to eradicate outmoded stereotypes about older Americans' proper place in the workforce. The Sixth Circuit's wooden reading of the ADEA subverts the very purpose of the Act as explicated in this Court's opinions. Review is warranted to resolve this tension.

III. The Ruling Below Is Inconsistent With Congressional Purpose And Intent

The court of appeals' holding that the ADEA permits *younger* employees to challenge favorable treatment of *older* employees is impossible to reconcile with Congress's purpose in enacting the ADEA. As this Court's decisions in *Hazen Paper* and *O'Connor* indicate, analysis of the statute as an integrated whole makes clear that the ADEA focuses on remedying discrimination against *older* workers arbitrarily based on their age. Thus, the statement of purpose that Congress wrote into the ADEA makes clear that it was intended to *benefit* older workers in particular, not to deprive employers of the ability to favor older employees in ways not offered to younger employees. Further, the existence of the minimum age limitation on the protected class belies the notion that the Act is intended to protect younger employees against their senior coworkers. Finally, the legislative history and the backdrop against which Congress passed the Act eliminate any possible doubt on this score. Consideration of each of these sources compels the conclusion that the court of appeals misconstrued the statute and contravened the congressional purpose that underlies the ADEA.

The court below gave no weight to any of these indicia of congressional intent because it concluded that the statutory text was so "plain" as to admit of only one possible interpretation. To the contrary, however, the term "age" is susceptible of at least two plausible constructions when considered in isolation. To be sure, "age" could be understood to refer merely to the number of years lived to date. Considerably more plausible, however, is the definition of "age" as referring to the "state of being old." *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 40 (1976) (defining "age," inter alia, as "[a]n advanced stage of life," "the latter part of life," and "[t]he quality or state of being old"); *accord* AMERICAN HERITAGE COLLEGE DICTIONARY 25 (3d ed. 1993) (defining "age," inter alia, as "[t]he state of being old; old age"); *see also Hamilton*, 966 F.2d at 1227 (differentiating "age" and "youth").

Thus, viewed in isolation, the term "age" in § 4(a)(1) could perhaps be read in the manner adopted by the court below. But "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). The court of appeals' counterintuitive construction derived from the court's insistence on beginning and ending with a single definition of an isolated term, without reference to parallel portions of the same statute or to the legislative purpose codified at the statute's outset. As this Court has cautioned, however, in many cases such a myopic methodology "would defeat the object which the Legislature intended to accomplish"; a court cannot "'look merely to a particular clause in which general words may be used'" but must instead "'take in connection with it the whole statute . . . and the objects and policy of the law . . . .'" *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)).

In the case of the ADEA, the first logical referents in ascertaining the proper meaning of § 4(a)(1) are the legislative findings and declaration of purpose in § 2. Because these overarching provisions are "included in the [Act's] text," they are particularly useful tools to "give[] content" to the Act's other terms. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999); *accord Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002); *cf. United Air Lines, Inc. v. McMann*, 434 U.S. 192, 198 (1977) (noting the interrelationship between the ADEA's purposive and prescriptive provisions and stating that "the Act is the vehicle by which its purposes are expressed and carried out").

The congressional findings emphasize that the Act was intended to address the difficulty that age discrimination poses for "older workers" and "older persons," who faced disproportionately high rates of unemployment due to the persistence of discriminatory, age-based stereotypes about their competence. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3); *see Hazen Paper*, 507 U.S. at 610; *EEOC v. Wyoming*, 460 U.S. at 230-31. Congress found that those stereotypes led employers to set "arbitrary age limits," which "work *to the disadvantage of older persons*" who are seeking "to retain employment, and especially to regain employment when displaced from jobs." ADEA § 2(a)(1)-(2), 29 U.S.C. § 621(a)(1)-(2) (emphasis added); *see W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 (1985) ("[T]he policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions."). The result of these discriminatory practices was that long-term unemployment became, "*relative to the younger ages*, high among *older workers*." ADEA § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphases added).

These findings, the product of extensive inquiry by Congress and, at its direction, by the Secretary of Labor, *see EEOC v. Wyoming*, 460 U.S. at 230-31 (detailing the genesis

and drafting of the Act), underscore the precision with which Congress focused on the disadvantages that *older* workers face "relative to the younger ages." The court of appeals' interpretation of the ADEA simply cannot be squared with these clear indications of congressional intent set forth in the text of the Act itself.

Significantly, moreover, Congress also declared that a primary purpose of the ADEA was "to help employers and workers find ways of meeting problems arising from *the impact of age on employment*." *Id.* § 2(b), 29 U.S.C. § 621(b) (emphasis added). The reference to "age" in this provision makes sense only if the term is defined, as discussed above, as synonymous with "advanced years" or "the state of being old"; it is not chronological age *per se*, but the problems often associated with relatively *advanced* years that would have an "impact . . . on employment" felt by both employers and employees. Congress's use of the term "age" in this sense here, at the outset of the Act, confirms that it used the term in the same sense in the Act's operative provision. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (quotation omitted)).

Congress's decision to set the lower bound of its protected class at 40 similarly refutes the notion that the Act forbids discrimination against younger individuals in favor of older workers. Workers enter the protected class at 40, which "testimony indicated . . . to be the age at which age discrimination in employment becomes evident." H.R. REP. No. 90-805, at 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219. Even if Congress had discerned a pattern of employees' facing arbitrary classifications rooted in inaccurate stereotypes about youth rather than age, it could hardly have

understood such a pattern to become evident *only at age 40*. For Congress to have prohibited reverse discrimination against younger workers, but simultaneously to have denied that doctrine's protection to its most likely beneficiaries—those under 40—would be nothing short of absurd. Statutes ought not be construed in a manner that yields absurd results. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993).[3]

Thus, considered in the statutory context in which Congress embedded it, the prohibition against discrimination "because of age" is susceptible of only one meaning—one that does not extend to discrimination against employees on account of their relative youth. The court of appeals' contrary determination improperly ignores the structure and context of the statute as a whole and violates fundamental canons of statutory construction adopted and repeatedly reaffirmed by this Court's decisions.

The legislative history of the ADEA serves only to bolster the majority view that "reverse discimination" is not actionable under the Act, and eliminates any possible doubt on this point. The President's message on the issue of age discrimination presaging his submission of a draft ADEA to Congress,[4] the comments of the Secretary of Labor on the

---

[3] Indeed, some state courts have determined that their state age discrimination laws cover reverse discrimination by reasoning that, *unlike the ADEA*, the state laws' protected classes contain no lower limit, or set the threshold at 18. *See, e.g., Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 845, 847 (Mich. Ct. App. 2000) (limited en banc); *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 950 (N.J. 1999); *Ogden v. Bureau of Labor*, 699 P.2d 189, 192 (Or. 1985) (in banc).

[4] *See* Special Message to the Congress Proposing Programs for Older Americans, 1 PUB. PAPERS 32, 37 (Jan. 23, 1967).

draft bill,[5] and the report of the committee that authored the bill that was ultimately enacted[6] all indicate that the ADEA was aimed at protecting *older* workers against employer practices and policies that favored *younger* workers—not the other way around.

The Sixth Circuit's rigid reading of a single provision of the Act threatens to produce precisely the opposite effect—to undermine the very protections and opportunities that Congress sought to secure. The court below pressed forward with this result, "whether specifically intended [by Congress] or not," App., *infra*, 12a (Cole, J., concurring), in the face of evidence from text, context, structure, and history that Congress can *only* have intended the term "age" to refer to the characteristic—relatively advanced years—shared by the "older workers" of the protected class.[7] Review is warranted

---

[5] *Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong. 47 (1967) (responses of Willard Wirtz, Sec. of Labor) [hereinafter *Hearings*] (describing the Act as "an over-age employment discrimination measure" and opposing a reduction in the age of coverage to 21, which would "change the nature of the proposal").

[6] *See, e.g.*, H.R. REP. NO. 90-805 (1967), at 6 (stating that the committee declined to lower the age limit to an age below 40 because to do so "would lessen the primary objective; that is, the promotion of employment opportunities for older workers"), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; *see also id.* at 1 ("It is the purpose of H.R. 13054 to promote the employment of older workers based on their ability."), *reprinted in* 1967 U.S.C.C.A.N. at 2214.

[7] Thus, the EEOC regulation seemingly accepting the reverse-discrimination theory, 29 C.F.R. § 1625.2(a), can offer no support for the lower court's decision, because it is contrary to the text and structure of the Act and accordingly is due no deference by this Court. *See, e.g., Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989).

to ensure that this intent is not frustrated and that the true meaning of the Act is furthered.

IV. The Question Presented Is An Important And Recurring One, And The Burdensome Impact Of The Decision Below Necessitates This Court's Review.

The Sixth Circuit's decision poses a serious threat to a wide variety of employer programs and policies that work to the benefit of older American workers. Indeed, the rule announced by the decision below threatens to effect a dramatic shift in the conduct of ADEA litigation writ large. Review by this Court is necessary to eliminate the grave consequences produced by this decision.[8]

---

[8] The reverse discrimination issue has already arisen in numerous federal courts from Maine to California. The question has already been presented at least to the court below, to the First and Seventh Circuits (which rejected it, as discussed above), and to the Ninth and Eleventh Circuits, which avoided resolving the issue by deciding their cases on narrower grounds. *Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995); *Edwards v. Bd. of Regents of the Univ. of Ga.*, 2 F.3d 382, 383 (11th Cir. 1993). As noted above, moreover, numerous district courts have also adjudicated the issue and have likewise reached divergent results. *See* cases cited *supra* note 2; *Stone*, 58 F.3d at 437 (noting the district court's holding that the ADEA does not prohibit reverse discrimination); *Conn v. First Union Bank of Va.*, Civ. Action No. 94-0901-R, 1995 U.S. Dist. LEXIS 9242, at *2-*7 (W.D. Va. Mar. 17, 1995) (holding that the ADEA does not prohibit reverse discrimination); *see also Greer v. Pension Ben. Guar. Corp.*, No. 00 CIV 1272 SAS, 2001 WL 137330, at *5 (S.D.N.Y. Feb. 15, 2001) (rejecting reverse discrimination claim under the ADEA on narrower grounds).

First and foremost, interpreting the Act to allow suits for reverse discrimination threatens to invalidate threshold-age requirements for a variety of employee benefits. In times of economic uncertainty, employers are faced with the need to scale back previously generous benefits programs; in many cases, the choice they face is between offering a retirement or other benefit only to some employees, and offering it to none. Threshold age classifications are common and important components of this scaling-back process.[9]

More generally, construing the ADEA to authorize reverse discrimination claims threatens to infuse a new across-the-board rigidity into employment decisions and remove employers' license to accommodate older workers' special needs. Because the Act applies to all the incidents of the employment relationship, employers seeking to facilitate the congressional purpose of welcoming older workers into gainful employment and encouraging them to remain will be pre-

[9] To be sure, the ADEA provides affirmative defenses that might ultimately defeat liability in some such instances involving certain types of benefits programs. *See* ADEA § 4(f)(2), (*l*), 29 U.S.C. § 623(f)(2), (*l*). However, requiring employers to make out one of these fact-specific affirmative defenses in order to avoid liability for reverse discrimination would impose far greater uncertainty and litigation expense on employers, and there is no guarantee that such defenses would ultimately be successful in any, let alone all, such cases. *See, e.g.*, *Wehrly*, 678 F. Supp. at 1382-83 (referring to the "manifestly unreasonable" burden on employers that would be imposed by requiring them to make out affirmative defenses to a non-cognizable claim). The *in terrorem* effect of the Sixth Circuit's decision is thus unmitigated by the hypothetical availability of potential affirmative defenses in a limited category of cases. And as discussed *infra*, the disruption likely to be worked by the reverse-discrimination rule is not limited to the benefits context.

cluded from offering those older workers any preferential treatment or incentive. For example, law enforcement agencies that maintain rigorous physical fitness requirements will likely be precluded from relaxing those standards for older personnel to facilitate their retention. *See, e.g.*, *Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996) (describing the U.S. Marshals Service's use of a physical fitness component, with an age-based sliding scale, in promotion decisions). Thus, employers will face the same Hobson's choice as in the benefits context: Either extend the age-tailored preference to *all* employees—an option that will frequently be prohibitively expensive or, as in the physical fitness example discussed in *Koger*, simply unrealistic—or withdraw the preference altogether. Perversely, those most injured by this interpretation will be the very group of older workers whose employment opportunities Congress sought to *enhance* by adopting the ADEA.

Another significant consequence of the Sixth Circuit's reverse-discrimination rule is a substantial increase in the difficulty of defending *conventional* age discrimination suits. In many such cases, the defendant has most readily dispelled an inference of age discrimination by demonstrating that *older* workers were treated better than the plaintiff. This form of proof has been particularly important in disparate impact cases,[10] in which statistical evidence is frequently essential to the analysis, *e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality opinion), and intent is largely irrelevant, *Griggs v. Duke Power Co.*, 401 U.S. 424,

[10] This Court has not yet resolved the circuit split over whether a plaintiff may maintain an ADEA claim on a theory of disparate impact. *Hazen Paper*, 507 U.S. at 609-10; *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1324-25 & n.5 (11th Cir.), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed*, 122 S. Ct. 1290 (2002).

432 (1971). However, the ability to show that older workers were treated more favorably than their younger counterparts is important in disparate treatment cases as well. *See, e.g.*, *Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 422 (6th Cir. 1999); *Koger*, 98 F.3d at 634 (noting such factors as the age-based sliding scale for physical fitness requirements as evidence that the Marshals Service acted to accommodate older deputy marshals, not to disfavor them). Yet under the Sixth Circuit's construction of the ADEA, this defense is no longer available to employers, because proof that older workers were favored simply establishes *another* ADEA violation rather than refuting the plaintiffs' initial claim.

Indeed, the union of the disparate impact and reverse discrimination theories in the ADEA will inexorably require employers to afford *absolute identity of treatment* to every worker over 40 in order to minimize the risk of ADEA liability. A number of cases permit ADEA plaintiffs to sue based on disparate impact on a *subset* of the Act's 40-and-over protected class,[11] even when the members of the protected class as a whole suffer no identifiable burden. Although this form of classifying by subset might make sense as a way of preventing discrimination directed against the very oldest workers, combining it with the reverse discrimination theory leaves it completely unbounded. Because age, unlike race or sex, does not confer membership in a discrete, readily ascertainable category, any workforce of any size contains a "virtually infinite number of age subgroups," *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999), and

[11] *E.g.*, *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129-30 (D. Del. 1994), *aff'd mem.*, 124 F.3d 186 (3d Cir. 1997); *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 3-4 (D. Me. 1994), *aff'd on other grounds*, No. 95-1046, 1995 WL 414831, at *4 n.4 (1st Cir. July 14, 1995).

thus any employment practice that disproportionately impacts *some* identifiable cohort within the ADEA's protected class might now be actionable—if not on an age discrimination theory, then on a reverse discrimination theory. Employers will be forced to ensure at least rough proportionality across every age cohort over 40, lest they disproportionately disfavor one subgroup and thereby subject themselves to potential liability and litigation expense limited only by the ingenuity and resourcefulness of class action plaintiffs' lawyers.

Thus, the rule laid down by the Sixth Circuit's decision is fraught with unanticipated consequences that will adversely affect a wide range of employment decisions and reshape the conduct of even conventional age discrimination litigation. Review is warranted to forestall the burdensome effects unleashed by the Sixth Circuit's distortion of Congress's purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 923-2776

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
WILLIAM M. JAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner

January 16, 2003

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Dennis Cline, *et al.*, Plaintiffs-Appellants, v. General Dynamics Land Systems, Inc. Defendant-Appellee.	No. 00-3468

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 99-07401—David A. Katz, District Judge

Argued: September 18, 2001
Decided and Filed: July 22, 2002

Before: RYAN and COLE, Circuit Judges; WILLIAMS, District Judge*

ARGUED: Mark W. Biggerman, REMINGER & REMINGER, Cleveland, Ohio, E. Bruce Hadden, HADDEN COMPANY, Columbus, Ohio, for Appellants. Craig C. Martin, JENNER & BLOCK, Chicago, Illinois, for Appellee. ON BRIEF: Mark W. Biggerman, REMINGER & REMINGER,

---

* Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Cleveland, Ohio, E. Bruce Hadden, HADDEN COMPANY, Columbus, Ohio, for Appellants. Craig C. Martin, JENNER & BLOCK, Chicago, Illinois, for Appellee.

RYAN, J., delivered the opinion of the court. COLE, J. (pp. 12-17), delivered a separate concurring opinion. WILLIAMS, D.J. (pp. 18-19), delivered a separate dissenting opinion.

OPINION

RYAN, Circuit Judge. We must decide whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, which prohibits an employer from discriminating against any employee age 40 and over on the basis of age, provides a cause of action for employees within the protected class who claim that their employer discriminated against them on the basis of age because of the employer's more favorable treatment of older employees, also within the class. We hold that on the facts of this case the ADEA does provide the plaintiffs a cause of action, and that they have made out an actionable claim.

We rest our holding on familiar canons of statutory construction too elementary to require a citation, which direct courts to apply statutes consistent with their plain language; that is, by assigning to the words of the statute their primary and generally understood meaning. We conclude that in dismissing the plaintiffs' complaint, the district court opinion departs from this familiar maxim, and therefore, we reverse the district court's judgment and remand for further proceedings.

I.

Dennis Cline, as named representative for the putative class, and 195 other employees of General Dynamics Land Systems, Inc., brought suit against their employer after their

labor union, the United Auto Workers, and General Dynamics entered into a new collective bargaining agreement (CBA2). The agreement took effect July 1, 1997. Before that date, the parties had been bound by a collective bargaining agreement (CBA1) that obligated General Dynamics to provide full health benefits to retired workers who had accumulated 30 years of seniority. With one exception, the new agreement no longer required General Dynamics to provide full health benefits to retirees. That exception held that only employees 50 years of age or older on July 1, 1997, remained eligible to receive full health benefits upon retirement. As a result, the plaintiffs sought, and obtained, a determination from the Equal Employment Opportunity Commission that the CBA2 adversely affected General Dynamics employees who were between the ages of 40 and 49 on July 1, 1997.

Cline and his fellow employees then filed suit under the ADEA, 29 U.S.C. §§ 621-634, and the Ohio Civil Rights Act, Ohio Rev. Code § 4112.99. They alleged that the provision of health benefits solely to those over the age of 50 constituted illegal discrimination based on age. Each of the plaintiffs was between the ages of 40 and 49 on July 1, 1997, and thus a member of the ADEA's protected class. For purposes of the lawsuit, the plaintiffs self-divided into three groups. The so-called "Cline group" is composed of 183 current General Dynamics employees who are no longer eligible for full health benefits upon retirement. The "Babb group" consists of 10 employees who retired prior to July 1, 1997, in order to receive full health benefits. Finally, the "Diaz group" includes three employees who retired after July 1, 1997, and are ineligible for health benefits.

In addition to their age discrimination claims, the plaintiffs also sought "declaratory judgment," but in their complaint they made no reference to the Declaratory Judgment Act; they simply requested that the district court determine

whether the Cline group had standing to sue and whether their claims were ripe. If the court determined that the Cline group did not have either standing and/or ripe claims, the plaintiffs then requested that the district court determine when they would have standing and ripe claims.

Upon the defendant's motion, the district court dismissed the plaintiffs' suit pursuant to Fed. R. Civ. P. 12(b)(6). At the outset of its memorandum opinion, the district court noted that the ADEA and the Ohio Civil Rights Act would be interpreted together and receive identical legal analyses. The district court characterized the plaintiffs' argument as a claim that they were wrongfully denied existing job benefits on the basis of age. The court held that under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(1), (2)(A), General Dynamics's provision of health benefits upon retirement was part of a "welfare benefit plan," which the company was not obligated to provide. The court concluded that it would have been permissible to withhold retiree health benefits from all employees under the CBA2. While the district court admitted that the CBA2 "facially discriminates" by creating two classes of employees based solely on age, it ultimately concluded that the ADEA does not recognize claims for "reverse discrimination." The court reasoned that the ADEA was drafted to aid "older workers,' not those who suffer age discrimination because they are too young. The district court did not specifically address Cline's request for declaratory relief.

II.

We review *de novo* a district court's grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Lawrence v. Chancery Court of Tenn.*, 188 F.3d 687, 691 (6th Cir. 1999).

The starting point in determining how a statute is to be applied is the language of the statute itself. *Consumer Prod.*

Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *United States v. Ospina*, 18 F.3d 1332, 1335 (6th Cir. 1994). This court has said that "[t]he primary rule of statutory construction is to ascertain and give effect to the legislative intent." *Hedgepeth v. Tenn.*, 215 F.3d 608, 616 (6th Cir. 2000). Legislative intent, however, is gleaned primarily from the statute's plain language, and where the statute's language is plain and unambiguous, there is no justification for resorting to legislative history to ascertain the lawmaker's intent—the words of the statute suffice. *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999). The Supreme Court has recognized that "statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Moreover, if a court thinks statutory language does not reflect what the court believes the legislators "must have" intended, the court may not, under the guise of "statutory interpretation," rectify the problem by holding, in effect, that the legislators intended something other than what they declared. "'It is not the Court's role to address perceived inadequacies in [a statute].'" *In re Aberl*, 78 F.3d 241, 244 (6th Cir. 1996) (quoting *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1269 (6th Cir. 1989)) (alteration in original). Thus, courts must apply a statute as its language directs, not in accordance with a judicial supposition as to what the legislature might better have written. The application of these simple and settled canons easily determines the proper resolution of this case. Section 623(a)(1) of the ADEA reads:

> It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges

> of employment, because of such individual's age.

29 U.S.C. § 623(a)(1) (emphasis added). This language clearly and unambiguously forbids employers from defining the terms and benefits of "any individual['s]" employment based solely on his or her age. In § 631(a), Congress declared that "any individual" means those "individuals who are at least 40 years of age." 29 U.S.C. § 631(a). Thus, by the law's plain language, an employer may not discriminate against any worker age 40 or older on the basis of age. Those younger than 40 are not protected by the ADEA. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

To reach the conclusion for which the defendant argues, and that was found persuasive by the district court, we would be required to hold that the plain language of § 623(a)(1) and § 631(a) does not mean what it says when it refers to "any individual," but means, instead, "older workers." Thus, only "older workers," meaning those individuals who are at least 40 years of age and, in addition, relatively older than any other group of employees with whom they are compared, are protected. This *interpretive* reading of the statute led the district court to conclude that the ADEA does not prohibit an employer from discriminating, on the basis of age, against "any individual" who is a member of the ADEA's protected class, but only prohibits discrimination against those in the protected class who are "older" than the favored employees. We think the plain meaning of the statute will not bear that reading.

In support of its holding, the district court cited to *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992), for the proposition that the ADEA does not recognize claims of reverse age discrimination. We recognize that *Hamilton* and the majority of courts to consider the question before us have held that the ADEA does not pro-

vide a cause of action for "reverse discrimination." *See, e.g., Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.); *Karlen v. City Colls. of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988); *Dittman v. General Motors Corp.*, 941 F. Supp. 284, 287 (D. Conn. 1996), *aff'd on other grounds*, No. 96-9442, 1997 WL 340267 (2d Cir. June 20, 1997) (unpublished disposition); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140 (D. Me. 1995); *but see Miss. Power & Light Co. v. Local Union Nos. 605 and 985, Int'l Bhd. of Elec. Workers*, 945 F. Supp. 980, 988 (S.D. Miss. 1996); *Rannels v. Hargrove*, 731 F. Supp. 1214, 1220-21 (E.D. Pa. 1990). For a variety of reasons, however, we do not find the reasoning undergirding these opinions persuasive.

We find that the *Hamilton* opinion fails to properly interpret the ADEA. First, it assigns far too much weight to the hortatory, generalized language of Congress's Statement of Findings and Purpose in the ADEA. Second, it ignores, indeed it reverses, the familiar rule that the more direct and specific language of a statute ordinarily trumps the more generalized. *Metro. Detroit Area Hosp. Servs., Inc. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980).

Turning to the Statement of Findings and Purpose:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, *older workers* find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs[.]
>
> . . . .
>
> (b) It is therefore the purpose of this chapter to promote employment of *older persons* based on their ability rather than age; to prohibit arbitrary age discrimination in employ-

> ment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(a)-(b) (emphasis added). Notably, neither § 621, nor any other section of the statute, provides a definition of "older workers" or "older persons." Nonetheless, because statutory language should be given its plain meaning absent evidence to the contrary, we agree that Congress intended to protect older workers. But to hold that the ADEA protects older workers from employers' age discrimination provides no answer to the question this litigation presents. The question here is whether any worker over the age of 40 ("any individual") may be discriminated against on the basis of age. To hold, as the ADEA requires us to hold, that employment age discrimination against *any* worker at least 40 years of age is prohibited, does nothing to defeat the congressional intent to protect "older workers" and "older persons."

To repeat: § 623(a)(1) and § 631(a), taken together, prohibit an employer from discriminating against "any individual" 40 years of age or older based on that person's age. "'When we can discern an unambiguous and plain meaning from the language of a statute, our task is at an end.'" *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir. 2000) (quoting *Bartlik v. U.S. Dept of Labor*, 62 F.3d 163, 166 (6th Cir. 1995)).

Our holding does not change even if one concludes—and we do not—that the hortatory language of § 621 is inconsistent with the plain meaning of § 623(a)(1) and § 631(a). When two different parts of a statute appear to conflict, the court should, if possible, give these parts a "harmonious, comprehensive meaning." *United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1184 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984). The exhortation in § 621 to protect "older workers" and "older persons" is easily reconciled with the specific provisions of § 623 and § 631, which prohibit age discrimination against "any individual" age 40 or older. Courts must interpret statutes "'as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'" *Cafarelli v. Yancy*, 226 F.3d 492, 499 (6th Cir. 2000) (citation omitted). In § 621, Congress declared its intention to protect older workers, and in § 623 and § 631, it identified the older workers it intends to protect as "any individual" age 40 or older. Thus, the several relevant sections of the statute are easily reconciled.

Moreover, we do not share the commonly held belief that this situation is one of so-called "reverse discrimination." Insofar as we are able to determine, the expression "reverse discrimination" has no ascertainable meaning in the law. An action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by law. Presumably, what the district judge and others mean when they conclude that the ADEA does not prohibit "reverse discrimination" is that otherwise prohibited discrimination is permitted if the victims are literally (statutorily) within the protected class, but are a group within the class who in most cases are the beneficiaries of discrimination against others. There is no basis for this conclusion. We are not aware of any legal doctrine permitting courts to redraft anti-discrimination statutes so that they better advance the court's view of sound policy. Furthermore, even if we granted the district court its definition of "reverse discrimination," it is clear that Cline and his classmates did not suffer "reverse age discrimination." By the plain language of the ADEA they are the victims of "age discrimination." Congress has singled out the over-40 class of workers from the general workforce for protection from age discrimination by their employers. All the plaintiffs are members of the protected class created by § 631(a), and all properly allege that they were denied job benefits due to their age. Therefore, the protected class

should be protected; to hold otherwise is discrimination, plain and simple.

Finally, we note that those courts adopting the *Hamilton* holding do so in contravention of the EEOC. The EEOC's interpretation of the ADEA "is significant because an agency's interpretation of an ambiguous provision within the statute it is authorized to implement is entitled to judicial deference." *Burzynski v. Cohen*, 264 F.3d 611, 619 (6th Cir. 2001) (internal quotation marks, citation, and alterations omitted). In its review of the matter at hand, the agency notes:

> *It is unlawful . . . for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over*. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

29 C.F.R. § 1625.2(a) (emphasis added). While a court can certainly interpret a statute and properly reach a different conclusion from a federal agency, we are persuaded that the EEOC's interpretation of the ADEA is a true rendering of the language.

III.

There is no doubt that the facts of this case are unusual and fall outside the typical ADEA claim, in that the plaintiffs were younger than the employees who were to receive health benefits upon retirement under the CBA2. But the fact that some members within the protected class were beneficiaries of the discriminatory action of which other members of the protected class—the plaintiffs—were victims, does not somehow suspend the language of the statute,

which prohibits age discrimination against "any individual" within the protected class. As we stated earlier, when the language of a statute is unambiguous we have no basis for seeking a statute's meaning in its legislative history or intent. *In re Comshare, Inc. Sec. Litig.*, 183 F.3d at 549. The syllogism goes like this: The ADEA expressly prohibits denying any employee within the protected class an employment benefit solely because of age. The CBA2 provision in question denies a group of employees within the protected class an employee benefit based solely on their age. Therefore, the ADEA prohibits the CBA2 provision in question.

If Congress wanted to limit the ADEA to protect only those workers who are *relatively* older, it clearly had the power and acuity to do so. It did not. Whatever the policy justifications for holding otherwise, we are bound by the plain language of the statute and have no occasion to look outside of the text.

IV.

We express no opinion whether the plaintiffs have made out an actionable claim under the Ohio Civil Rights Act because we think the district court should be given the opportunity to consider that question in light of what we have decided today with respect to the ADEA.

V.

Because Cline and the other plaintiffs were each within the ADEA's protected class when their employer allegedly discriminated against them on the basis of age, we REVERSE the district court's grant of the motion to dismiss. On remand, the district court should address the plaintiffs' declaratory judgment argument concerning standing and ripeness, which was not considered by the district court and thus is not properly before us for review.

CONCURRENCE

R. GUY COLE, JR., Circuit Judge, concurring. I write separately to briefly set forth my thinking on this interesting question of law. While I join Judge Ryan's opinion based on the force of the plain language of the ADEA, I also entertain serious doubts as to whether Congress specifically intended that the ADEA allow persons ages forty and over to recover for so-called reverse age discrimination. Ultimately, from the text and structure of the ADEA, I conclude that in enacting the ADEA, Congress was most concerned with prohibiting age discrimination that favors younger over older employees, but that Congress's choice of language, whether specifically intended or not, also prohibits age discrimination that favors older over younger protected employees. With that perspective in mind, I emphasize three points: (1) sections 623 and 631 of Chapter 29 of the United States Code have clear meaning—they prohibit any form of age discrimination against persons ages forty and over; (2) no legally acceptable reason exists for looking beyond the language of the statute here; and (3) allowing reverse age discrimination suits is reconcilable with the "substantially younger" requirement announced in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).

First, the text of the ADEA compels the conclusion that members in the protected class can sue for age discrimination that favors older over younger workers. Section 623 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Section 631 limits that age discrimination prohibition to "individuals who are at least 40 years of age." 29 U.S.C. § 631(a). Thus, taken together, §§ 623 and 631 unambiguously prohibit using age as a basis for employment decisions involving persons ages forty and over.

Second, this Court is bound to apply the plain language of the ADEA here. The law of the Circuit is well-established; in its efforts to interpret a statute, a court may look beyond the text only in four limited instances: (1) where the text is ambiguous; (2) where a literal reading is inconsistent with other statutory provisions; (3) where a plain-language reading is inconsistent with congressional intent; (4) where the plain statutory meaning leads to absurd results. *See Vergos v. Gregg's Enters., Inc.*, 159 F.3d 989, 990 (6th Cir. 1998); *Appleton v. First Nat'l Bank of Ohio*, 62 F.3d 791, 801 (6th Cir. 1995); *see also Limited, Inc. v. Comm'r of Internal Revenue*, 286 F.3d 324, 332 (6th Cir. 2002) ("Resort to legislative history is not appropriate, however, if the text of the statute may be read unambiguously and reasonably."). Not one of those limited situations is present here. And, for that reason, there is no basis for looking beyond the plain statutory language.

As discussed above, the texts of §§ 623 and 631 are not ambiguous. Rather, they suggest an unequivocal result—age discrimination in employment is generally unlawful and persons ages forty and over may sue an employer for such discrimination. Therefore, there is no ambiguity-based reason to look beyond the plain text of §§ 623 and 631.

Also, a literal reading of §§ 623 and 631 is not inconsistent with other statutory provisions. The Seventh Circuit in *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226 (7th Cir. 1992), concluded that § 621(a)'s reference to "older workers" suggests that the ADEA's age discrimination prohibition applies only to workers who are older *vis-a-vis* preferably treated workers. *Id.* at 1228. But, § 621(a)'s use of the phrase "older workers" is at most ambiguous because "older workers" could also refer to that population of workers ages forty

and over. Thus, at worst, there still is no definite inconsistency between our interpretation of §§ 623 and 631 and the language of § 621(a). However, in contrast to the Seventh Circuit's holding, our reading of §§ 623 and 631 does not render § 623(*l*)(1)(A) meaningless. Section 623(*l*)(1)(A) allows an employer to set a minimum age as a condition for eligibility in a pension plan. 29 U.S.C. § 623(*l*)(1)(A). If younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in § 623(*l*)(1)(A) would not be necessary (because only younger employees could sue based on a minimum retirement age). In sum, because our reading of §§ 623 and 631 is not manifestly inconsistent with § 621 (a) and because § 623(*l*)(1)(A) has significance only if §§ 623 and 631 permit reverse age discrimination suits, there is no statutory conflict to justify looking beyond the text of the statutes.

In addition, this Court should not look beyond the statutory text because interpreting §§ 623 and 631 as allowing reverse age discrimination suits is consistent with Congress's statutorily stated intent for enacting the ADEA. *See* 29 U.S.C. § 621(b). In § 621(b), Congress declared that the purposes of the ADEA were "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* Allowing younger employees to sue older employees for age discrimination is consistent with those purposes. For example, when a forty-two-year-old employee loses her job or benefits in favor of a fifty-two year-old employee due to her age, that termination is not based on her ability. Moreover, that loss of job or benefits furthers, instead of prohibits, arbitrary age discrimination in employment. Finally, permitting that type of age discrimination to continue without a remedy hardly amounts to a solution to the problems arising out of

the impact of age on employment. In short, because a plain language reading of §§ 623 and 631 is consistent with the ADEA's purpose, there is no conflict between the specific intent of Congress and the statutory text to justify considering sources beyond the statutes themselves.

Finally, this Court is confined to reviewing only statutory text because allowing reverse discrimination suits by persons in the protected class is not absurd as either a matter of reason or of policy. Allowing persons in the protected class to sue for reverse discrimination is a reasonable means of redressing two of the findings that prompted Congress to enact the ADEA. *See generally* 29 U.S.C. § 621. Congress declared in § 621(a)(1) that "in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." 29 U.S.C. § 621(a)(1). Permitting younger members of the protected class to sue employers for age discrimination in favor of older workers is consistent with that finding. For example, a fifty year-old employee is equally disadvantaged in retaining and regaining employment if he is age discriminated against in favor of a thirty year-old as if he is age discriminated against in favor of a sixty year-old. In another of its findings, Congress declared that "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4). Thus, Congress concluded that all age discrimination burdens commerce. Consequently, even the so-called reverse discrimination suits would alleviate the congressionally identified burden on commerce.

Likewise, as a matter of policy, allowing reverse age discrimination suits is not absurd. Such an interpretation hardly "open[s] the floodgates to attacks on every retirement plan," as the Seventh Circuit feared. *Hamilton*, 966 F.2d at 1228. Rather, courts have already begun to interpret

state discrimination laws as allowing reverse age discrimination suits. *See, e.g.*, *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 957 (N.J. 1999) (7-0 decision) (concluding that New Jersey's Law Against Discrimination was "broad enough to accommodate [plaintiffs] claim of age discrimination based on youth"); *Ogden v. Bureau of Labor*, 699 P.2d 189, 192 (Or. 1985) (en banc) (interpreting Oregon age discrimination law as allowing claims by younger workers); *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 845, 847 (Mich. Ct. App.) (holding that the Michigan Civil Rights Act "protects workers who are discriminated against on the basis of youth"), *appeal denied*, 618 N.W.2d 596 (Mich. 2000); *see also Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 405 n.27 (D. Me. 1994) (noting that the Maine Human Rights Act does not limit age discrimination claims to a certain range of ages). Thus, based on the congressional statements of purpose and similar state-law provisions, it is not absurd to allow members of the protected class to sue for reverse discrimination.

The third reason for my separate concurrence is to reconcile the implicit tension between our conclusion today and the Supreme Court's holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In *Consolidated Coin,* the Supreme Court considered whether to satisfy the *prima facie* test for indirectly proving age discrimination, an ADEA plaintiff had to be replaced by a person outside the protected class. *Id.* at 312. More concretely, the Court had before it the issue of whether a fifty-six year-old employee who was replaced by a forty year-old satisfied the fourth element of the *prima facie* test even though both employees belonged to the protected class. *Id.* The Court's analysis hinged on the logical connection between the elements of the *prima facie* test and illegal age discrimination. *Id.* at 311-12. After looking first at the text of the ADEA, the Supreme Court concluded that the fourth element of the *prima facie* test should include a "substantially younger" requirement instead of a "membership in the protected class" requirement. *Id.* at 313. Thus, *Consolidated Coin* instructs that to indirectly prove age discrimination, an ADEA plaintiff must demonstrate age discrimination that favors a substantially younger person.

Although this is a direct evidence age discrimination case and consequently does not rely on the *prima facie* test, the impact of the substantially younger requirement is significant. The substantially younger requirement implies that reverse age discrimination claims are not permitted under the ADEA because when discriminated against in favor of older workers, younger protected workers cannot prove that substantially younger persons were favored. As a result, those younger workers could not satisfy the substantially younger requirement, and thus could not state a *prima facie* claim under the ADEA. In short, *Consolidated Coin*, by limiting the *prima facie* test to persons injured by discrimination that favors someone substantially younger, suggests that reverse age discrimination claims are not permitted under the ADEA.

Despite that implication, three reasons give me confidence that the Supreme Court would approve of our result today. First, the Supreme Court was not considering reverse age discrimination in *Consolidated Coin.* Second, the *Consolidated Coin* holding acknowledged that members within the protected class may sue one another. Third, we follow the same recipe as the Supreme Court did—we look to the plain text of §§ 623(a)(1) and 631(a) to determine whether so-called reverse age discrimination is actionable under the ADEA. Based upon the combined effect of these three reasons, I do not believe that Supreme Court precedent dictates a result different than what we reach today. Moreover, had the Supreme Court also considered the question of reverse age discrimination in *Consolidated Coin*, I believe it would have expressed the fourth part of the *prima facie* test as requiring proof of "substantial difference in age" as op-

posed to "substantially younger." And, notably, based on our holding, the fourth prong of the *prima facie* test in this Circuit requires proof of substantial difference in age, not necessarily substantially younger proof.

In short, the result we reach today strikes me as counter-intuitive. But, the clarity with which Congress spoke convinces me that the ADEA permits younger workers in the protected class to sue their employers for age discrimination that favors older employees. Also, although a close call, I do not believe that our result violates Supreme Court precedent. For those reasons, I agree to reverse the district court's dismissal of plaintiffs' ADEA claims.

DISSENT

GLEN M. WILLIAMS, District Judge, dissenting. Whether you call it "reverse discrimination" or not, no court in the nation has recognized a claim for age discrimination under the ADEA when brought by younger workers within the protected class arguing that they were discriminated against in favor of older workers. As the majority recognizes above, the ADEA was developed by Congress for the purpose of alleviating problems faced by older workers, not the problems of younger ones. In this case, workers who were between 40 years of age and 50 years of age have brought this action claiming that, because they are a part of the protected class—all people older than 40—they are entitled to protection under the ADEA not only from workers who are younger than they are, but also from workers who are older than they are.

I am persuaded by the Seventh Circuit's reasoning in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), that such a claim is not cognizable under the ADEA. As the court in *Hamilton* explained, "the ADEA 'does not protect

the young as well as the old, or even, we think, the younger *against* the older.'" *Id.* at 1227 (quoting *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988)). The court reasoned that age discrimination cannot be reversed as can sex or race discrimination because "[a]ge is not a distinction that arises at birth. Nor is age immutable." *Id.*

Furthermore, while the statutory language of the ADEA may leave room for argument that reverse age discrimination is cognizable, I concur with the *Hamilton* court in that Section 621 of the ADEA refers to "older workers" and "older persons." *See* 29 U.S.C. § 621. These references are, therefore, telling of Congress's intent to prohibit employers from discriminating against older workers, as opposed to younger ones.

Finally, this dissent is based on a common sense understanding of collective bargaining agreements. I am of the opinion that the ADEA was not intended to interfere with the collective bargaining process or with collective bargaining agreements. The courts should not stand watch over labor unions who represent employees of a company and interfere with their negotiations with employers. I believe that it is obvious that the older a person is, the greater his or her needs become. Therefore, a 50-year-old worker may need more protection or more benefits than a 40-year-old worker. The majority's holding in this case potentially could have a devastating effect on the collective bargaining process, calling into question the validity of seniority and early retirement programs contained in collective bargaining agreements across the country. If such is allowed, bargaining for all workers, regardless of age, would suffer.

For the foregoing reasons, I would affirm the district court's decision to grant the Appellee's motion to dismiss based upon the determination that the Appellants did not allege facts to support a claim for discrimination under the

ADEA. Therefore, I respectfully dissent from the majority's opinion.

I do concur in the majority's decision not to consider whether the plaintiffs have made out an actionable claim under the Ohio Civil Rights Act because the district court should be given the opportunity to address this issue on remand.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dennis Cline, *et al.*, Plaintiff, vs. General Dynamics Land Systems, Inc. Defendant.	Case No. 3:99 CV 7401 **MEMORANDUM OPINION**

KATZ, J. [Issued March 10, 2000]

This matter is before the Court on Defendant's motion to dismiss. For the following reasons, Defendant's motion will be granted.

BACKGROUND

The 196 named plaintiffs to this action are present or former employees of Defendant General Dynamics Land Systems, Inc. ("the Company") who were between forty and fifty years of age on July 1, 1997. At all times relevant to this dispute, the employment relationship was governed by a collective bargaining agreement ("CBA") between Plaintiffs and the Company.

The CBA that was in effect prior to July 1, 1997 ("CBA1") provided for continued health insurance benefits for retirees. The Company and Plaintiffs' union renegotiated that provision when CBAl ended. The renegotiated provision, which was included in the new CBA ("CBA2"), pro-

vided that continued retiree health insurance benefits would be provided only for employees who were at least fifty years of age on July 1, 1997, the effective date of CBA2.

Plaintiffs claim that CBA2 violates their rights by discriminating against them on the basis of their age. There are three subcategories of plaintiffs: (1) the "Cline group" consists of 183 current employees who were eligible for retiree health insurance benefits under CBA1, but not under CBA2; (2) the "Babb group" consists of ten employees who retired prior to July 1, 1997 in order to preserve their benefits under CBA1; and (3) the "Diaz group" consists of three employees who retired after July 1, 1997 and did not receive the continued health insurance benefits to which they would have been entitled under CBA1. Plaintiffs bring this action under the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 *et seq.*, and analogous state law. They seek declaratory and injunctive relief, damages, and costs and fees.

Defendant has filed a motion to dismiss Plaintiffs' claims. It argues that age discrimination in favor of employees over the age of fifty does not violate applicable federal and state antidiscrimination law. Plaintiffs have responded to Defendant's motion, Defendant has replied, and Plaintiffs have filed a surreply. The Court discusses the parties' contentions below.

DISCUSSION

A. Motions to Dismiss

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b), the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984), while viewing the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683,

1686, 40 L. Ed. 2d 90 (1974); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The Court is without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Westlake*, *supra*, at 858. *See generally* 2 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE, § 12.34[1] (3d ed. 1997).

B. Age Discrimination

Plaintiffs claim that their employer illegally discriminated against them on the basis of their age. The Age Discrimination in Employment Act generally prohibits employers from discriminating against employees on the basis of age. 29 U.S.C. § 623(a).[1] In this case, the CBA facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty, who are entitled to retiree health care benefits, and employees under the age of fifty, who are not. The sole issue before the Court on Defendant's motion to dismiss is whether the ADEA permits this sort of "reverse discrimination" whereby older workers receive favorable treatment relative to younger workers.

Plaintiffs have argued at length that they have not alleged reverse discrimination on the basis of age, and that reverse discrimination is not the issue before the Court. They say their claim is that they were wrongfully denied existing job

---

[1] The Ohio Civil Rights Act provides the same. Ohio Rev. Code § 4112.02(A). For convenience, the Court will analyze Plaintiffs' federal and state law claims together, since the legal tests are the same under both statutes. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St. 2d 192, 196, 421 N.E.2d 128, 131 (1981).

benefits to which they had previously been entitled, and that such denial was based on their age.

That argument lacks merit. The Employee Retirement Insurance Security Act ("ERISA") divides employee benefit plans into two types: pension plans and welfare benefit plans. 29 U.S.C. § 1002(1), (2)(A). A retiree health insurance benefits plan is a welfare benefit plan, which is not subject to statutory vesting requirements. Thus, it would have been permissible under ERISA for Plaintiffs' union and the Company to agree to abrogate the retiree health insurance benefits program for all current employees in CBA2. The fact that the benefits were available under CBA1 is not relevant to a determination of whether entitling only employees over the age of fifty to retiree health care benefits violates ADEA. The sole issue before this Court is whether an employer may legally provide a benefit to workers over the age of fifty, while denying that same benefit to workers below the age of fifty.

Every federal court to have addressed the issue has held that a claim of reverse age discrimination is not cognizable under ADEA. *E.g.*, *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226, 227-28 (7th Cir. 1992); *Dittman v. General Motors Corp.*, 941 F. Supp. 284, 287 (D. Conn. 1996); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995). Plaintiffs have cited to no case that permitted an employee to bring a claim of reverse discrimination under the ADEA, and this Court is aware of none. This is because Congress' purpose in enacting ADEA was to address the problems faced by *older* workers, not workers who suffer discrimination because they are too young. *Hamilton*, 966 F.2d at 228. Accordingly, the Court finds that Plaintiffs have not alleged any facts upon which they can prevail on their age discrimination claim

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is granted.

IT IS SO ORDERED.

/s/
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX C

00-3468
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED September 19, 2002
Leonard Green, Clerk]

DENNIS CLINE, *et al.*,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
GENERAL DYNAMICS LAND SYSTEMS, INC.,	)	
	)	
	)	
Defendant-Appellee.	)	
	)	

BEFORE: RYAN and COLE, Circuit Judges; and WILLIAMS*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

* Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Williams would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

Supreme Court, U.S.
FILED
MAR 21 2003
CLERK

No. 02-1080

In the Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

E. BRUCE HADDEN
HADDEN CO., L.P.A.
132 NORTHWOODS BLVD.
COLUMBUS, OH 43235
(614) 431-2000

MARK W. BIGGERMAN
Counsel of Record
REMINGER & REMINGER CO., L.P.A.
101 PROSPECT AVENUE, W.
SUITE 1400 MIDLAND BLDG.
CLEVELAND, OH 44115-1093
(216) 687-1311

Counsel for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTION PRESENTED

Does Respondents' amended complaint state a claim for age discrimination?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption in Petitioner's Petition for a Writ of Certiorari. Respondents do not have any corporate affiliations.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF CASES, CITATIONS, AUTHORITIES . . v

I. INTRODUCTION 1

II. REASONS TO DENY THE PETITION 3

A. The Sixth Circuit's Opinion Is Not in Conflict with That of Another United States Court of Appeals 3

1. This Case Does Not Involve Reverse Discrimination 3

2. There Is No Conflict with *Hamilton v. Caterpillar* 5

3. There Is No Conflict with *Schuler v. Polaroid Corp* 7

a. Schuler's Facts Are Not Analogous 7

b. Petitioner's Reliance on *Schuler* is Misplaced 8

B. The Sixth Circuit's Opinion Is Not in Conflict with the Precedent of This Court 9

1. There Is No Conflict with *O'Connor v. Consolidated Coin Caterers Corp* 9

2. There Is No Conflict with *Hazen Paper Co. v. Biggins* 10

C. The Sixth Circuit's Opinion Is Not Inconsistent with Congressional Purpose and Intent 11

D. The Sixth Circuit's Decision Does Not Pose a Burdensome Impact 16

1. Programs and Policies Will Not Be Threatened 16

2. There Will Be No Increased Difficulty in Defending Age Discrimination Suits 18

III CONCLUSION 19

TABLE OF CASES, CITATIONS, AUTHORITIES

Federal Cases

United States Supreme Court

Browning v. Clinton,
292 Fed.3d 235 (C.A.D.C. 2002) 1

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1, 120 S.Ct. 1942,
147 L.Ed.2d 1 (2000) 12

Hazen Paper Co. v. Biggins,
507 U.S. 604, 113 S.Ct. 1701,
123 L. Ed.2d 338 (1993) 10, 11

Negonsott v. Samuels,
507 U.S. 99, 113 S.Ct. 1119,
122 L.Ed.2d 457 12

O'Connor v. Consolidated Coin Caters Corp.,
517 U.S. 308, 116 S.Ct. 1307,
134 L.Ed.2d 433 (1996) 9, 13

Swierkiewicz v. Sorema N. A.,
534 U.S. 506, 122 S.Ct. 992,
152 L.Ed.2d 1 (2002) 18

Circuit Courts

Bodnar v. Synpol, Inc.,
843 F.2d 190 (5th Cir.1988) 8

Cline v. General Dynamics,
296 F.3d 466 (6th Cir. 2002) . . . . . *Passim*

Gray v. New England Tel. and Tel. Co.,
792 F.2d 251 (1st Cir. 1986) 8

Hamilton v. Caterpillar, Inc.,
966 F.2d 1226 (7th Cir. 1992) 5, 6, 7

Pierce v. Commonwealth Life Ins. Co.,
40 F.3d 796 (6th Cir. 1994) 3

District Courts

Cline v. General Dynamics Land Systems, Inc.,
98 F.Supp.2d 846 (N.D. Ohio 2000) 1

Jones v. Slater Steels Corp.,
660 F.Supp. 1570 (N.D. Ind. 1987) 3

Murphy v. Milwaukee Area Technical College,
976 F.Supp. 1212 (E.D. Wis. 1997) 3

Schuler v. Polaroid Corp.,
848 F.2d 276 (1st Cir. 1988) 7, 8, 9

Federal Statutes

29 U.S.C. § 621 16

29 U.S.C. § 623 (also referred to generally as the ADEA)
. . . . . *Passim*

29 U.S.C. § 631 . . . . . 9, 13, 14

Federal Rules

Fed. R. Civ. P. 12(B) 1

Federal Regulations

29 C.F.R. § 1625.2 . . . . . 6, 7, 15, 17

I. INTRODUCTION

The present case involves a well-reasoned decision by the United States Court of Appeals for the Sixth Circuit. The plain language of the Age Discrimination in Employment Act (ADEA) was applied to a situation where there was direct evidence of age discrimination. Rescission of continued health insurance benefits after retirement by an employer to employees age 40-49 solely on the basis of age constitutes age discrimination.

Petitioner, General Dynamics Land Systems, Inc., has petitioned this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit set forth in *Cline v. General Dynamics*, 296 F.3d 466 (6th Cir. 2002). Petitioner asserts the Sixth Circuit's decision conflicts with those of other circuits and this Court, is contrary to congressional purpose and intent and will reek general havoc if not reversed. Petitioners' claims and fears are overstated and exaggerated.

The Sixth Circuit's decision does not permit "reverse age discrimination." The core issue here is whether Respondents' amended complaint should be dismissed for failure to state a claim. Put simply, does Respondents' amended complaint state a claim for age discrimination? Since this case involves a motion pursuant to Fed. R. Civ. P. 12(B), dismissal is appropriate only if Respondents can prove no set of facts in support of their claim which would entitle them to relief. *Browning v. Clinton*, 292 Fed.3d 235, 242 (C.A.D.C. 2002) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957)). The Sixth Circuit reversed the trial court's grant of Petitioner's motion to dismiss. *See Cline v. General Dynamics Land Systems, Inc.*, 98 F.Supp.2d 846 (N.D. Ohio 2000).

The Sixth Circuit's opinion is not in conflict with any decisions of this Court or United States courts of appeals. Neither does the opinion depart from the accepted and usual course of judicial proceedings. Finally, the Sixth Circuit's decision does not involve a question of federal law that has not been, but should be, settled by this Court.

Respondents, employees of Petitioner, were between the ages of 40-49 as of July 1, 1997. *Cline*, 296 F.3d at 468. Pursuant to a prior collective bargaining agreement (CBA1), they were entitled to receive continued health insurance benefits upon retirement. *Id.* However, Petitioner executed a successor collective bargaining agreement (CBA2) which rescinded the continued health insurance benefits from Respondents by limiting health insurance coverage upon retirement to employees who were 50 years of age or older as of July 1, 1997. In other words, since Respondents were not 50 on that date, their entitlement to benefits was permanently extinguished and would not be revived even when they turned 50.

The Equal Employment Opportunity Commission (EEOC) agreed with Respondents, finding that CBA2 adversely affected them as a result of their age. *Id.* at 468. In *Cline*, the dissenter was U.S. District Court Judge Glenn M. Williams, a senior judge for the Western District of Virginia, who was sitting by designation. The majority and concurring opinions were authored by Sixth Circuit panel members.

II. REASONS TO DENY THE PETITION

A. The Sixth Circuit's Opinion Is Not in Conflict with That of Another United States Court of Appeals.

1. This Case Does Not Involve Reverse Discrimination.

Petitioner contends that the ADEA does not recognize claims for "reverse discrimination" and that the Sixth Circuit's holding that reverse discrimination is cognizable under the ADEA conflicts with virtually every other court to consider the question. (See Petition, p. 7-8). However, the present case does not involve reverse discrimination.

Reverse discrimination involves a claim brought by someone **outside** the protected class. *See eg., Murphy v. Milwaukee Area Technical College*, 976 F.Supp. 1212, 1216 (E.D. Wis. 1997) (Strict application of the *McDonnell Douglas* standard would eliminate all cases of reverse discrimination by preventing a plaintiff from making out a prima facie case because, by definition, the plaintiff is not a member of a protected class); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994) (a prima facie showing of reverse discrimination requires a showing that the employer discriminated against employees who were similarly-situated but not members of the protected class); *Jones v. Slater Steels Corp.*, 660 F.Supp. 1570, 1575 (N.D. Ind. 1987) (*prima facie* test in reverse discrimination cases must be modified to reflect the fact that the majority, rather than the minority, is the object of reverse discrimination). This is not the case here. Respondents are members of the protected class.

To emphasize this point: **would any court characterize a civil rights/discrimination claim brought by an African-American citizen as "reverse discrimination?" Clearly not, because the African-American would be a member of the protected class.**

As stated by the Sixth Circuit, the ADEA forbids employers from defining the terms and benefits of any individual's employment based solely on his/her age. *Cline*, 296 F.3d at 469 (citing 29 U.S.C. § 623(a)(1)). "Any individual" is defined as individuals who are at least 40 years old. *Id*. This is a straightforward formula.

First, is an individual at least 40 years old? Second, did the employer define that individual's benefits based solely on his/her age? In the present case, Respondents were age 40 or older and their benefits were rescinded solely because of their age. This is a claim involving direct evidence of age discrimination since Respondents are members of the protected class and allege a rescission of their benefits due to their age. *See Cline*, 296 F.3d at 471.

Petitioner claims that Sixth Circuit held that reverse discrimination is cognizable under the ADEA. (See Petition, p. 7). This is not true. The majority opinion explained:

> even if we granted the district court its definition of "reverse discrimination," it is clear that Cline and his classmates did not suffer "reverse age discrimination." By the plain language of the ADEA they are the victims of "age discrimination."

Cline, 296 F.3d at 471. Further explanation followed:

> the fact that some members within the protected class were beneficiaries of the discriminatory action of which other members of the protected class--the plaintiffs--were victims, does not somehow suspend the language of the statute, which prohibits age discrimination against "any individual" within the protected class.

Id. at 472. Therefore, the decision is not in conflict with the cases cited by Petitioner for the proposition that the ADEA does not permit reverse discrimination claims. This case does not involve reverse discrimination.

2. There Is No Conflict with *Hamilton v. Caterpillar*.

Petitioner asserts that the "Sixth Circuit's holding is diametrically opposed to other decisions addressing the same issue on almost precisely the same facts." (See Petition, p. 9). Citing *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), Petitioner incorrectly claims that the facts in *Hamilton* are virtually identical to those presented in the present one. (See Petition, p. 9).

In *Hamilton*, the employer negotiated the establishment of a new special early retirement program with the plaintiffs' union in anticipation of closing several plants. *Hamilton,* 966 F.2d at 1226-27. The key term here is new. Previously, early retirement benefits were only available to workers 60 years or older. *Id*. at 1227. The newly negotiated program granted previously unavailable benefits to workers age 50 and older. *Id*.

Thus, in *Hamilton*, the employer provided additional benefits to workers age 50 or older. In contrast, Petitioner was not closing any plants and did not extend new benefits to workers age 50 and older. Instead, employees age 50 and older were permitted to keep their benefits while Respondents' (age 40-49) benefits were rescinded. These differences are significant. **Offering supplementary benefits to a select group is hardly the same as denying benefits to a group because of their age**.

Moreover, the special early retirement program at issue in *Hamilton* was essentially a severance package offered only to employees age 50 and older, which is permissible under 29 C.F.R. § 1625.2(b), which reads:

> The **extension** of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination.

Id. (emphasis added). Thus, the discussion in *Hamilton* about reverse age discrimination was unnecessary. The carving out of a subset of older employees within the protected group was lawful because new benefits were extended to those employees.

Extension of severance benefits to older employees displaced due to plant closings might legitimately counteract problems related to age. Employees would be immediately faced with having to find another job. Those over 50 would likely have more difficulty relocating and gaining new employment.

On the other hand, any impact related to post-retirement health care benefits (such as in the instant case) would not impact the employee until he/she retires. The employees who were 50 as of July 1, 1997, will have benefits while those who were age 40-49 on that date will not.

Further, Petitioner's health care benefits are not the same as severance payments. Additionally, there was no extension of new benefits. Respondents' benefits were revoked. Accordingly, although the conduct in *Hamilton* might not have violated the ADEA, the facts and reasoning in that opinion are not applicable to the present circumstances. Therefore, there is no conflict and the Sixth Circuit case and *Hamilton* may be reconciled through 29 C.F.R. § 1625.2(b)'s authorization to extend additional benefits to older employees.

3. There Is No Conflict with *Schuler v. Polaroid Corp.*

Petitioner states that the Sixth Circuit's decision is also inconsistent with *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988). This is not true.

a. *Schuler's* Facts Are Not Analogous.

There are several factual differences between *Schuler* and the present case. First, *Schuler* involved a severance plan as opposed to a collective bargaining agreement. *Id.* at 278. Second, there was no allegation that older workers were treated less favorably than younger workers. Additionally, unlike the CBA in the present case, which permits benefits solely on the basis of age, the *Schuler* severance plan offered greater benefits to those with more seniority. *Id.* In other words, there was no direct evidence of age discrimination.

Accordingly, the facts in *Schuler* are drastically different than those in the present case. As a result, there can be no conflict between that case and the decision below. It follows then that there is no need for this Court to resolve any conflict where none exists.

b. Petitioner's Reliance on *Schuler* is Misplaced.

Petitioner contends that *Schuler* stands for the proposition that the ADEA does not forbid treating older persons more generously than others. (See Petition, p. 10). However, other than that isolated statement, which was separate and apart from the material holding, there was no in-depth analysis or application of this statement to the factual circumstances. Instead, the court simply supported this statement by citing two cases.

The first it cited was *Bodnar v. Synpol, Inc.*, 843 F.2d 190 (5th Cir.1988), in which non-union employees sued regarding a special early retirement incentive program. *Id.* at 191-92. However, this case contains no language even inferring that the ADEA permits treating older persons more generously than others in the protected class. As a result, it fails to support the proposition for which it was cited in *Schuler*.

The second case cited was *Gray v. New England Tel. and Tel. Co.*, 792 F.2d 251 (1st Cir. 1986). It involved a voluntary, early-retirement program. *Id.* at 255. Curiously, it too failed to even allude that the ADEA allows more generous treatment of older persons than others in the protected class. Thus, it also does not support the proposition in *Schuler*.

In short, the Sixth Circuit's decision does not conflict with *Schuler*. The case involved a severance plan linked to seniority, not age. Additionally, the language cited by Petitioner is a mere isolated and unsupported statement in that opinion. The opinion cited two cases for the principle that the ADEA does not forbid treating older persons more generously than others. However, those cases did not support that proposition. Accordingly, there is no need for this Court to reconcile any conflict between *Schuler* and the present case.

B. The Sixth Circuit's Opinion Is Not in Conflict with the Precedent of This Court.

1. There Is No Conflict with *O'Connor v. Consolidated Coin Caterers Corp.*

Petitioner argues that the Sixth Circuit's opinion cannot be reconciled with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). However, Circuit Judge Cole gave three reasons why it can. He explained:

> First, the Supreme Court was not considering reverse age discrimination in *Consolidated Coin*. Second, the *Consolidated Coin* holding acknowledged that members within the protected class may sue one another. Third, we follow the same recipe as the Supreme Court did-we look to the plain text of §§ 623(a)(1) and 631(a) to determine whether so-called reverse age discrimination is actionable under the ADEA. Based upon the combined

> effect of these three reasons, I do not believe that Supreme Court precedent dictates a result different than what we reach today.

Cline, 296 F.3d at 475.

Petitioner criticizes Judge Cole's explanation as a "blithe assumption that this Court did not mean what it said in *O'Connor*." (See Petition, p. 12). Yet, *O'Connor* is distinguishable as well. That case involved indirect evidence of discrimination and utilized the *McDonnell Douglas* test. *O'Connor*, 517 U.S. at 310. The present case involves direct evidence of age discrimination. *Cline*, 296 F.3d at 475. Thus, the elements of establishing a prima facie case do not come into play and the "substantially younger" requirement does not apply. As a result, there can be no conflict since the two cases are not analogous.

2. There Is No Conflict with *Hazen Paper Co. v. Biggins*.

Petitioner also contends that the decision below runs counter to this Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L. Ed.2d 338 (1993). (See Petition, p. 12). Petitioner focuses on this Court's reference to the use of the phrase "older workers." *Id*. For example, Petitioner claims that *Biggins* explained that the prohibited stereotypes that the ADEA seeks to eliminate are those adverse to older employees. *Id*. at 12-13. In conclusion, Petitioner states that the Sixth Circuit's decision subverts the very purpose of the ADEA and its primary aim to eradicate outmoded stereotypes about older Americans' proper place in the workforce. *Id*. at 13.

In *Biggins*, this Court also held that "[a]n employee who is younger than 40 [is] outside the class of older workers as defined by the ADEA." *Biggins*, 507 U.S. at 612, 113 S.Ct. at 1707. Thus, this Court considered anyone 40 years of age or older to be within the protected class and an "older worker."

This Court did not appear to view the definition of older workers as narrowly as Petitioner, which was critically described by the Sixth Circuit as: "those individuals who are at least 40 years of age and, in addition, relatively older than any other group of employees with whom they are compared." *Cline*, 296 F.3d at 469. Therefore, Respondents, being age 40 or older, would be considered by this Court to be "older workers." As a result, Respondents contend there is no conflict with *Biggins*.

C. The Sixth Circuit's Opinion Is Not Inconsistent with Congressional Purpose and Intent.

Petitioner argues that the Sixth Circuit's opinion "is impossible to reconcile with Congress's purpose in enacting the ADEA." (See Petition, p. 13). The reason, Petitioner asserts, is "that the ADEA focuses on remedying discrimination against *older* workers arbitrarily based on their age." *Id*. (emphasis in original). Yet, this is precisely what occurred in the case below.

This Court has held:

> we begin with the understanding that **Congress "says in a statute what it means and means in a statute what it says there,"** *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254,

> 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). As we have previously noted in construing another [statute], **when "the statute's language is plain, 'the sole function of the courts'"**--at least where the disposition required by the text is not absurd—"**'is to enforce it according to its terms.'**" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 1947, 147 L.Ed.2d 1 (2000) (emphasis added). This Court also held: "**"Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.**" *Negonsott v. Samuels*, 507 U.S. 99, 113 S.Ct. 1119, 1123, 122 L.Ed.2d 457 (emphasis added) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)).

The Sixth Circuit applied this formula in its decision. It stated:

> courts must apply a statute as its language directs, not in accordance with a judicial supposition as to what the legislature might better have written. The application of these simple and settled canons easily determines the proper resolution of this case. Section 623(a)(1) of the ADEA reads:
>
> It shall be unlawful for an employer--

> (1) to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1) (emphasis added). This language clearly and unambiguously forbids employers from defining the terms and benefits of "any individual['s]" employment based solely on his or her age. In § 631(a), Congress declared that "any individual" means those "individuals who are at least 40 years of age." 29 U.S.C. § 631(a). Thus, by the law's plain language, an employer may not discriminate against any worker age 40 or older on the basis of age. Those younger than 40 are not protected by the ADEA. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).

Cline, 296 F.3d at 469 (emphasis in original). To repeat the most important line: **"by the law's plain language, an employer may not discriminate against any worker age 40 or older on the basis of age."** *Id.* (emphasis added).

As explained by the Sixth Circuit, the term, "older workers," is not mentioned in §§ 623(a)(1) or 631(a) or any other section of the statute. *Id.* at 469. Instead, the term used is "individual." Yet, even if those terms are synonymous, they both refer to the protected class, defined by the Act as those 40 years of age and older. In the case below,

the opinion did focus on remedying discrimination against individuals and/or older workers age 40 and older.

Regardless of whether you call them "individuals" or "older workers," §§ 623(a)(1) and 631(a) protect Respondents from illegal discrimination on the basis of age. Does Petitioner dispute that Respondents are "older workers" under the Act?

Petitioner's definition of older workers (or individuals) seems to change according to the circumstances. For example, if protected class members allege that employees older than them received preferential treatment due to their age, Petitioner apparently believes that their status has been altered and they are no longer older workers or individuals under §§ 623(a)(1) and 631(a). This argument is easier to make when using the term "older workers" because Respondents are not older than the employees who still receive their continued health insurance benefits. However, successful presentation of this line of reasoning diminishes when one uses the term "individuals" as set forth in § 631(a).[1]

When "individuals," is used, Petitioner's argument is rendered futile. This is because the logic espoused by Petitioner cannot hold muster in light of the plain statutory language. As stated by Sixth Circuit:

> To reach the conclusion for which the defendant argues, and that was found persuasive by the district court, we would be required to hold that the plain language of § 623(a)(1) and § 631(a) does not mean what it says when it refers to "any individual," but means, instead, "older workers." Thus, only "older workers," meaning those individuals who are at least 40 years of age and, in addition, relatively older than any other group of employees with whom they are compared, are protected. This *interpretive* reading of the statute led the district court to conclude that the ADEA does not prohibit an employer from discriminating, on the basis of age, against "any individual" who is a member of the ADEA's protected class, but only prohibits discrimination against those in the protected class who are "older" than the favored employees. We think the plain meaning of the statute will not bear that reading.

Cline, 296 F.3d at 469 (emphasis in original).

Petitioner claims that "the statement of purpose that Congress wrote into the ADEA makes clear that it was intended to benefit older workers in particular, not to deprive employers of the ability to favor older employees in ways not offered to younger employees." (See Petition, p. 13). Again, other than the vague reference to the term, "older workers," there is no statutory support, particularly in the enforcement or definitions sections of the Act, for this assertion.

In fact, the EEOC has issued a regulation interpreting the ADEA in a manner identical to the Sixth Circuit's opinion. 29 C.F.R. §1625.2(a) provides:

> It is unlawful in situations where [the ADEA] applies, for an employer to discriminate in hiring or in any other way by

[1] This is quite possibly the reason why Petitioner always uses the term, "older workers" rather than "individuals."

> giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, **the employer may not lawfully turn down either one on the basis of age**, but must make such decision on the basis of some other factor.

(emphasis added). Therefore, the EEOC also interprets the ADEA to encompass discrimination against anyone within the protected age group.

This regulation and interpretation still protects the entire protected class and thus the "older workers" as described in § 621(a)-(b). For example, assume a 41 year-old was discriminated against on the basis of age in favor of a 51 year-old. The former is still considered an older worker by the ADEA. Thus, by permitting that individual to bring suit, the Act would still serve to protect an older worker.

The plight of older workers is not limited to potential favorable treatment of younger workers over them. Older workers are generally at a disadvantage when faced with involuntarily having to find new employment or replace job benefits taken from them. Thus, the Sixth Circuit's decision does not conflict with congressional intent.

D. The Sixth Circuit's Decision Does Not Pose a Burdensome Impact.

1. Programs and Policies Will Not Be Threatened.

Petitioner contends that the "Sixth Circuit's decision poses a serious threat to a wide variety of employer programs

and policies that work to the benefit of older American workers." (See Petition, p. 19). For example, Petitioner fears that interpreting the ADEA as the Sixth Circuit did "threatens to invalidate threshold-age requirements for a variety of employee benefits." *Id.* at 20. In other words, Petitioner claims that in times of academic uncertainty, employers are faced with the need to scale back benefit programs. "In many cases, the choice [employers] face is between offering a retirement or other benefit only to some employees, and offering it to none." *Id.*

By way of example, Petitioner is concerned that employers "will be precluded from offering those older workers any preferential treatment or incentive." *Id.* at 20-21. Additionally, that law enforcement agencies will be precluded from relaxing rigorous physical fitness requirements for older personnel. These fears are unreasonable and unwarranted.

As stated above, 29 C.F.R. § 1625.2(b) permits the extension of additional benefits, such as increased severance pay, to older employees within the protected group if the employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. In Petitioner's examples, certain employees are given preferential treatment or additional benefits. This is permitted by 29 C.F.R. § 1625.2(b).

The difference in the present case is that Respondents' continued health insurance benefits were rescinded due to their age. Petitioner made eligibility of continued receipt of retirement benefits contingent on being 50 years of age or older. Since Respondents were not 50, they lost their benefits.

Such a contingency amounts to nothing less than a rescission of employment benefits to members of the protected class ages 40-49 solely to their age. Any way you examine it, it is age discrimination.

2. There Will Be No Increased Difficulty in Defending Age Discrimination Suits.

Petitioner argues that a significant consequence of the Sixth Circuit's decision is that there will be "a substantial increase in the difficulty of defending conventional age discrimination suits." (See Petition, p. 21). In support of this, Petitioner explains that in disparate impact cases, defendants may dispel an inference of age discrimination by demonstrating that older workers were treated better than the plaintiff. *Id.* This is also important, says Petitioner, in disparate treatment cases. *Id.* at 22. However, the present case is distinguishable from both disparate impact and treatment cases because it involves direct evidence of age discrimination.

Disparate impact and treatment cases differ from those involving direct evidence of age discrimination. Specifically, they deviate in the manner in which a Plaintiff must prove his/her case and how the employer must defend. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511, 122 S.Ct. 992, 997, 152 L.Ed.2d 1 (2002) (if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a *prima facie* case and the *McDonnell Douglas* framework does not apply). Therefore, the burden-shifting method of proof to which Petitioner refers does not apply to direct evidence cases. *Cline*, 296 F.3d at 475 ("this is a direct evidence age discrimination case and consequently does not rely on the *prima facie* test").

Accordingly, Petitioner's fears are not well-founded. This case involves direct evidence of age discrimination. Thus, "dispelling" of inferences in cases incorporating the *McDonnell Douglas* test will not be affected by the Sixth Circuit's decision.

III. CONCLUSION

For the reasons set forth above, Respondents assert that the Sixth Circuit's opinion is not in conflict with any decisions of this Court or United States courts of appeals, does not depart from the accepted and usual course of judicial proceedings or involve a question of federal law that has not been, but should be, settled by this Court. Accordingly, Respondents respectfully request that this Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

Mark W. Biggerman
Counsel of Record
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
MBiggerman@Reminger.com
(216) 687-1311
(216) 687-1841 {fax}

E. Bruce Hadden
Hadden Co., L.P.A.
132 Northwoods Blvd.
Columbus, OH 43235
EBHadden@aol.com
(614) 431-2000
(614) 436-4500 {fax}

(6)

Supreme Court, U.S.
FILED
APR 1 2003
CLERK

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 923-2776

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
WILLIAM M. JAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner

16 pp

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. The Decision Below Is In Clear And Irreconcilable Conflict With The Decisions Of This Court And Lower Federal Courts On A Pure Question Of Law That Merits This Court's Review 1

A. The Lower Federal Courts Are Divided Over The Pure Question of Statutory Interpretation Presented By This Case 2

B. The Sixth Circuit's Construction Conflicts With This Court's Precedents And Will Have A Dramatic And Deleterious Impact On ADEA Litigation Absent This Court's Review 5

II. The Decision Below Is In Clear Conflict With Congressional Purpose And Intent 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Barnett v. Dep't of Veterans Affairs, 153 F.3d 338 (6th Cir. 1998) 8

EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) 3

Hamilton v. Caterpillar Inc., 966 F.2d 1226 (7th Cir. 1992) 2,3,4

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 2,7

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 7

Lawrence v. Town of Irondequoit, No. 01-CV-6306L, __ F. Supp. 2d __, 2002 WL 32001763 (W.D.N.Y. Oct. 29, 2002) 4

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 6,7,8

O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) 2,6,7,8

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 6

Schiltz v. Burlington N. R.R., 115 F.3d 1407 (8th Cir. 1997) 8

Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988) 5,6

State Police for Automatic Ret. Ass'n v. DiFava, 317 F.3d 6 (1st Cir. 2003) 5

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 10

Turlington v. Atlanta Gas Light Co., 135 F.3d 1428 (11th Cir. 1998) 8

Vanasco v. Nat'l-Louis Univ., 137 F.3d 962 (7th Cir. 1998) 8

Williams v. Raytheon Co., 220 F.3d 16 (1st Cir. 2000) 8

Statutes and Rules

ADEA § 2, 29 U.S.C. § 621 10

ADEA § 2(a)(1), 29 U.S.C. § 621(a)(1) 9

ADEA § 2(a)(2), 29 U.S.C. § 621(a)(2) 9

ADEA § 2(a)(3), 29 U.S.C. § 621(a)(3) 9

ADEA § 2(b), 29 U.S.C. § 621(b) 9

ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1) ..... *passim*

ADEA § 11(*l*), 29 U.S.C. § 630(*l*) 3

ADEA § 12(a), 29 U.S.C. § 631(a) 9

29 C.F.R. § 1625.2(b) 3,4

Other Authorities

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) 10

REPLY BRIEF FOR PETITIONER

As the petition makes clear, this case squarely presents the legal question whether the ADEA permits plaintiffs to sue for reverse age discrimination. That issue is a pure question of statutory construction on which the lower federal courts have taken irreconcilably opposed positions. The majority of federal courts to consider the issue have held that the ADEA does not prohibit employers from favoring older employees over younger employees; in the decision below, the Sixth Circuit held precisely the opposite. The Sixth Circuit's erroneous interpretation of the statute, if allowed to stand, will affect virtually every case filed under that statute, both by opening the door to a new form of ADEA litigation and by making defense against conventional ADEA suits vastly more difficult. Review is warranted so that this Court can resolve the square conflict over the proper construction of the ADEA and restore the interpretation that faithfully carries out Congress's expressed purpose of protecting older workers.

I. The Decision Below Is In Clear And Irreconcilable Conflict With The Decisions Of This Court And Lower Federal Courts On A Pure Question Of Law That Merits This Court's Review

Notwithstanding the Sixth Circuit's forthright admission that its decision conflicts with those of numerous other federal courts, including the First and Seventh Circuits (Pet. App. 6a-7a), respondents attempt to obscure the sharpness of the divide among the circuits by citing various immaterial factual distinctions among the cases. Respondents' efforts are unavailing; the court below was clearly correct in acknowledging the circuit conflict over the question presented, and that question plainly warrants plenary review.[1]

---

[1] Respondents also contend that this case does not involve "reverse" discrimination because "[r]everse discrimination in-

Equally without merit are respondents' attempts to harmonize the decision below with this Court's precedents. As even the concurring judge below conceded (Pet. App. 16a), the panel majority's holding is unquestionably in "tension" with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), and it also runs counter to the reasoning adopted in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *See* Pet. 11-13. For these reasons as well, this Court's review is necessary in order to bring coherence and consistency to this important area of the law and to alleviate the burden imposed on nationwide employers who now find themselves placed in the impossible position of being obligated to comply with mutually inconsistent interpretations of the same far-reaching federal statute.

A. The Lower Federal Courts Are Divided Over The Pure Question of Statutory Interpretation Presented By This Case

Without disputing General Dynamics' showing that the reasoning and holding of *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226 (7th Cir. 1992), are directly at odds with the reasoning and holding of the decision below, respondents offer spurious factual distinctions in an effort to explain away the

---

volves a claim brought by someone *outside* the protected class." Opp. 3. Respondents' semantic quibble is utterly without significance, of course, because the fundamental question that divides the circuits and that is squarely presented in this case is whether the ADEA creates a cause of action for employees who are at least 40 years of age and who claim that they have been discriminated against because of their relative youth. Most of the courts that have considered such claims characterize them as "reverse" discrimination claims, for obvious reasons, and General Dynamics has accordingly adopted the same shorthand formulation, but the fundamental question is the same regardless of the label respondents or the court below may seek to apply.

conflict. Respondents' efforts cannot conceal the existence of a clear circuit split over the question presented here.

First, respondents suggest that *Hamilton* is somehow distinguishable because the employer in that case conferred *new* benefits on employees who were at least 50 years old, whereas General Dynamics preserved existing benefits for employees over 50 while ceasing to provide them for younger employees. Opp. 5-6. Respondents' proffered distinction is preposterous, and finds no support in the categorical language used by the court below. If reverse discrimination is actionable under the ADEA, as the court below held, it is equally actionable whether it takes the form of the extension of additional benefits to favored older employees or the withdrawal of existing benefits from disfavored younger employees. The ADEA does not distinguish between the discriminatory conferral or denial of benefits, but instead forbids all discrimination against protected individuals "because of . . . age." ADEA §§ 4(a)(1), 11(*l*), 29 U.S.C. §§ 623(a)(1), 630(*l*).[2] The only question relevant here is whether the statute also forbids discrimination because of *youth*; the court below held that it does, whereas the Seventh Circuit in *Hamilton* held that it does not.

Respondents also attempt to distinguish *Hamilton* based on a fact-specific affirmative defense that the Seventh Circuit's opinion in that case never discusses. According to respondents, "the discussion in *Hamilton* about reverse age discrimination" – *i.e.*, the entire body of the court's opinion – was "unnecessary" because the defendants in that case could have made out a defense under 29 C.F.R. § 1625.2(b). Opp. 6. But § 1625.2(b) applies only "if an employer has a rea-

---

[2] *See, e.g., EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1391-92, 1393-94 (9th Cir. 1984) (holding an employer liable under the ADEA for creating a new severance benefit for which only employees under 55 were eligible).

sonable basis to conclude that [additional] benefits will counteract problems related to age discrimination." There is no support whatsoever for respondents' assertion that the factual predicates for such a defense could have been satisfied in *Hamilton*; indeed, this defense was not mentioned in the Seventh Circuit's opinion, and there is no reason to believe it was even advanced.[3] The Seventh Circuit instead held, cogently and persuasively, that the plaintiffs' underlying legal theory – reverse discrimination – is not actionable under the ADEA. 966 F.2d at 1227-28. That holding is the sole basis for the Seventh Circuit's decision, and it is squarely at odds with the Sixth Circuit's decision below.

Even the court below forthrightly acknowledged that its decision created the circuit split detailed in the petition but now denied by respondents. Pet. App. 6a-7a. Indeed, the Sixth Circuit explicitly wrote that it thought the Seventh Circuit's "*Hamilton* opinion fail[ed] to properly interpret the ADEA." *Id.* at 7a. This straightforward statement makes plain that these decisions announce diametrically opposed constructions of § 4(a)(1) and that these opposing answers to the controlling legal question cannot be reconciled based on any purported factual distinction.

Nor did the court below attempt to draw such an irrelevant factual distinction between its decision and the contrary holdings of "the majority of [other] courts" that had pronounced upon the issue.[4] Rather, it acknowledged that these

---

[3] Far from relying on the regulation's affirmative defense to support its holding, the Seventh Circuit instead discussed other aspects of § 1625.2 and concluded that it "exceeds the scope of the statute." *Hamilton*, 966 F.2d at 1228.

[4] That majority has since expanded. *See Lawrence v. Town of Irondequoit*, No. 01-CV-6306L, __ F. Supp. 2d __, 2002 WL 32001763, at *10 (W.D.N.Y. Oct. 29, 2002) (rejecting a reverse discrimination theory and disagreeing with the decision below).

other cases had also presented "the question before us," but it rejected their reasoning in favor of its own distorted reading of § 4(a)(1). Pet. App. 6a-7a. Thus, respondents' attempt to criticize and distinguish the First Circuit's decision in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988) (Breyer, J.), is wholly without merit. *See* Opp. 7-9. Then-Judge Breyer's opinion for the First Circuit clearly and unambiguously adopted the construction of the ADEA advanced by General Dynamics here, stating that the Act "does not forbid treating older persons *more* generously than others" covered by the Act. 848 F.2d at 278. Indeed, in a recent decision construing the ADEA, the First Circuit reaffirmed *Schuler*'s holding in this regard. *State Police for Automatic Ret. Ass'n v. DiFava*, 317 F.3d 6, 15 (1st Cir. 2003). Respondent notes that *Schuler* involved a severance plan rather than a collective bargaining agreement, and asserts that there was no "direct evidence" of age discrimination in that case, but those proffered distinctions are specious at best. The *Schuler* court's construction of the ADEA is squarely in conflict with the decision below, as the Sixth Circuit itself recognized.

B. The Sixth Circuit's Construction Conflicts With This Court's Precedents And Will Have A Dramatic And Deleterious Impact On ADEA Litigation Absent This Court's Review

As the petition discusses, the Sixth Circuit's announcement of a reverse discrimination rule has implications for virtually every ADEA case. The definition of discrimination under § 4(a)(1) necessarily controls the composition of the prima facie test that courts apply in ADEA cases. Thus, the holding that § 4(a)(1) forbids discrimination on the basis of youth conflicts with this Court's most recent refinement of the prima facie test and with the lower federal courts' application of that test. Similarly, the definition of discrimination

under § 4(a)(1) affects employers' attempts to defend against both disparate treatment and disparate effect claims.

The question whether a given employment practice can be said to discriminate within the meaning of § 4(a)(1) is logically antecedent to the question of how a given plaintiff will *prove* that it discriminates. This Court reiterated in *O'Connor*, for example, the essential connection between the ADEA's definition of discrimination on the basis of age and the prima facie case by which courts frequently structure the presentation of proof in ADEA cases.[5] As the Court noted, "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" 517 U.S. at 311-12 (citation omitted).

Because the question whether reverse discrimination is actionable under the ADEA is independent of the method of proof being utilized in a given case, respondents are incorrect in their assertion that the decision below cannot meaningfully conflict with decisions in other cases that happened to involve methods of proof other than direct evidence. They are equally mistaken in their prediction that the distortive effect of the erroneous decision below will be limited to a single category of ADEA cases.

Respondents rely on the purported distinction between "direct evidence" cases and cases involving other forms of proof to distinguish the opinion below from this Court's decision in *O'Connor*, Opp. 10; then-Judge Breyer's opinion for the First Circuit in *Schuler*, *id.* at 7; and, indeed, the run

---

[5] This Court has reserved the question whether the burden-shifting evidentiary framework first set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies in ADEA actions. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *O'Connor*, 517 U.S. at 311.

of ADEA litigation, *id.* at 18-19.[6] But as the petition conclusively demonstrates, the Sixth Circuit's decision was premised on a construction of § 4(a)(1) that is fundamentally incompatible with the construction underlying these other decisions, regardless of the form of proof employed, as well as with congressional purpose and intent.[7]

In *O'Connor*, for example, this Court held that "the fact that a replacement is *substantially younger* than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." 517 U.S. at 313 (emphasis added). This formulation of a key element of the plaintiff's prima facie

---

[6] Respondents' proffered distinction is untenable even on its own terms, because it misreads the governing law in seeking to separate "direct evidence" cases from "disparate treatment" cases. Opp. 18. As this Court has made clear in cases such as *Hazen Paper*, "direct evidence" is not a category separate and apart from "disparate treatment," but rather a subset thereof. Discrimination claims can generally be separated into "disparate treatment" and "disparate impact" theories. *Hazen Paper*, 507 U.S. at 609. "Disparate treatment" requires "'[p]roof of discriminatory motive . . . , although it can *in some situations* be inferred from the mere fact of differences in treatment,'" as the establishment of an unrebutted prima facie case permits. *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) (emphasis added). Thus, disparate treatment claims comprise those proven via direct evidence as well as those proven via circumstantial evidence presented within the burden-shifting *McDonnell Douglas* framework.

[7] Indeed, as *amici* point out, allowing reverse discrimination suits under the ADEA would have a significant impact even in the direct evidence context, because it would preclude employers from offering age-based benefits specifically calculated to assist older workers. *E.g.*, Central States Amicus Br. at 2-3, 8; EEAC Amicus Br. at 13-16.

case necessarily reflects the Court's understanding that the ADEA prohibits discrimination against *older* workers in favor of *younger* workers. Several courts of appeals have adopted a similar understanding, expressly incorporating the "substantially younger" element discussed in *O'Connor* into the test that an ADEA plaintiff must satisfy in order to make out a prima facie case. *See, e.g.*, *Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000); *Barnett v. Dep't of Veterans Affairs*, 153 F.3d 338, 341 (6th Cir. 1998); *Vanasco v. Nat'l-Louis Univ.*, 137 F.3d 962, 965 (7th Cir. 1998); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998); *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1412-13 (8th Cir. 1997). These courts' adoption of this test reflects their understanding of § 4(a)(1) as prohibiting only discrimination that favors younger over older workers, an understanding that is incompatible with the decision below.

Similarly, because the Sixth Circuit's interpretation of § 4(a)(1) necessarily applies to *all* allegations of discrimination under that section, not merely to direct-evidence cases, employers' efforts to defend against conventional age discrimination suits will become more difficult, *regardless* of the form of proof involved in the case. Respondents blithely opine (Opp. 18-19) that cases incorporating the *McDonnell Douglas* test will not be affected, but as demonstrated in the petition (without rebuttal from respondents), the rule adopted by the Sixth Circuit in fact has a direct and deleterious effect on those cases as well, both because it dramatically lessens the plaintiff's prima facie burden in a manner inconsistent with *O'Connor* and the court of appeals cases cited above, and also because it eliminates the ability of employers to rebut a plaintiff's prima facie case (whether based on the *McDonnell Douglas* framework, "direct evidence," or a disparate effects theory) by demonstrating that older workers are in fact treated *more* favorably than either the plaintiff class or the purported beneficiaries of the alleged discrimination. *See* Pet. 21-23; EEAC Amicus Br. at 17-19.

This difficulty is even more pronounced in disparate impact litigation, in which intent is irrelevant. As the petition describes in detail (Pet. 21-23), and as respondents do not even attempt to dispute, permitting employees to sue for both age discrimination and reverse discrimination significantly increases the number of employer actions that will have a disparate impact on *some* cohort of workers over 40, even if older cohorts are treated *more* favorably. *See also* EEAC Amicus Br. at 19 n.7. The far-reaching and harmful implications of the decision below, and the court of appeals' failure to apply the teachings of this Court, further demonstrate the need for this Court's review.

II. The Decision Below Is In Clear Conflict With Congressional Purpose And Intent

As the petition demonstrates, the Sixth Circuit's holding that the ADEA creates a cause of action for reverse discrimination is utterly at odds with congressional purpose and intent. Considered as an integrated whole, the ADEA plainly protects older workers from discrimination based on their relatively advanced years; it does not protect individuals who happen to be over 40 against a converse form of discrimination based on their relative youth.

Respondents challenge the petition's reliance on the phrase "older workers," claiming that it "is not mentioned in § 623(a)(1), § 631(a) or any other section of the statute." Opp. 13. To the contrary, however, the ADEA's statement of purpose expressly codifies Congress's intent to protect "older workers" and "older persons" "relative to the younger ages." ADEA § 2(a)(1)-(3), (b), 29 U.S.C. § 621(a)(1)-(3), (b). Respondents also err in suggesting that "older workers" must be given a meaning identical to the term "individual" used in §§ 4(a)(1) and 12(a). Opp. 11, 13-14. Respondents are clearly "individuals" within the meaning of the latter provisions, because they are at least 40 years old; but it is equally clear that they are not "older workers" or "older persons"

than the employees protected by General Dynamics' decision to preserve retiree medical benefits for individuals who were at least 50 years old. The question is not respondents' membership in the protected class, but the illegality of the alleged "discrimination."

On this point, respondents do not even attempt to counter the petition's construction of § 4(a)(1), the only construction that faithfully interprets that provision in relation to the ADEA as an organic whole rather than in artificial isolation. Respondents do not dispute that the term "age" is susceptible of at least two plausible constructions when considered in isolation. Pet. 14. And respondents do not attempt to quarrel with the elementary principle that legislative findings are particularly useful tools to "give[] content" to the statute's other terms. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). Applying that principle and construing § 4(a)(1) in light of the duly enacted statement of congressional findings and purpose in § 2, which focus on the protection of "older workers" from unfair, age-based stereotypes about their continued productivity, it becomes clear that the term "age" as used by § 4(a)(1) can be plausibly defined only as "[t]he quality or state of being old." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 40 (1976); *see also* Pet. 14 (listing comparable definitions from other sources).

By adhering to its crabbed reading of a single line of statutory text, the court below frustrated the congressional intent that is apparent from consideration of the ADEA as a whole. Review is warranted to correct that error and restore the construction of § 4(a)(1) as Congress enacted it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 923-2776

WILLIAM J. KILBERG
Counsel of Record
THOMAS G. HUNGAR
WILLIAM M. JAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Counsel for Petitioner

April 1, 2003

MOTION FILED
MAR 21 2003

(3)

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN BENEFITS COUNCIL, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF PETITIONER

DANIEL Y. YAGER
TIMOTHY J. BARTL
LPA, INC.
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8670

Attorneys for Amicus Curiae LPA, Inc.

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

March 21, 2003

Additional Counsel Listed on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN D. BRYANT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amicus Curiae
The Chamber of Commerce
of the United States

LYNN D. DUDLEY
Vice President and Senior
Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

Attorney for Amicus Curiae
American Benefits Council

CATHERINE CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230

Attorney for Amicus Curiae
American Benefits Council

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1615 H Street, N.W.
Washington, D.C. 20004
(202) 637-3000

Attorneys for Amicus Curiae
National Association of
Manufacturers

MARK J. UGORETZ
THE ERISA INDUSTRY
COMMITTEE
1400 L Street, N.W.
Suite 350
Washington, D.C. 20005
(202) 789-1400

Attorney for Amicus Curiae
The ERISA Industry Committee

IN THE

Supreme Court of the United States

No. 02-1080

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC); LPA, Inc. (LPA); The Chamber of Commerce of the United States (the Chamber); the National Association of Manufacturers (NAM); the American Benefits Council (ABC); and The ERISA Industry Committee (ERIC) hereby respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the position of the petitioner in this case. The written consent of the attorney for the petitioner has been filed with the Clerk of the Court. The consent of the attorney for the respondents was requested but refused.

In support of their motion, EEAC, LPA, the Chamber, NAM, ABC, and ERIC submit the following:

1. The decision of the Sixth Circuit in this case creates significant uncertainty in an area of substantial importance to employers. In particular, the decision below jeopardizes employer-sponsored benefit plans. By forcing employers to reevaluate common employer practices that benefit older workforce employees, such as enhanced retiree health programs and pension plans, the decision below could have the perverse effect of reducing the availability of such benefits for all workers. In addition, the decision below also subjects employers to significantly more, and potentially conflicting, discrimination claims over their personnel actions.

2. Their experience in these matters makes EEAC, LPA, the Chamber, NAM, ABC, and ERIC well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

3. The Equal Employment Advisory Council is a nationwide association of over 340 large employers that are firmly committed to promoting sound approaches to the elimination of discriminatory employment practices.

4. LPA, Inc. is a public policy advocacy organization representing corporate executives responsible for human resource policy from more than 200 leading corporations doing business in the United States.

5. The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country.

6. The National Association of Manufacturers is the nation's largest multi-industry trade association, representing 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

7. The American Benefits Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees, including sponsoring or providing services to retirement and health plans covering more than 100 million Americans.

8. The ERISA Industry Committee is a non-profit organization representing America's largest private employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, which often operate in more than one state, and sometimes in all fifty states, providing benefits to millions of active workers, retired persons, and their families nationwide.

9. All of EEAC's, LPA's and ERIC's members, and many of the members of the Chamber, NAM, and ABC are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment statutes and regulations.

10. As employers, and as potential respondents to employment discrimination claims, members of EEAC, LPA, the Chamber, NAM, ABC, and ERIC have a strong interest in the issue presented for the Court's consideration—whether the ADEA provides a cause of action for "reverse" discrimination for someone who claims that an older worker was treated more favorably. By recognizing such a cause of action, the Sixth Circuit's decision puts in doubt many employer practices, in addition to retiree health benefits, that previously had been commonly accepted.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council, LPA, Inc., The Chamber of Commerce of the United States, the National Association of Manufacturers, the American Benefits Council, and The ERISA Industry Committee respectfully request that the Court grant them leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

DANIEL Y. YAGER
TIMOTHY J. BARTL
LPA, INC.
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8670
Attorneys for Amicus Curiae LPA, Inc.

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN D. BRYANT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W
Washington, D.C. 20062
(202) 463-5337
Attorneys for Amicus Curiae The Chamber of Commerce of the United States

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1615 H Street, N.W.
Washington, D.C. 20004
(202) 637-3000
Attorneys for Amicus Curiae National Association of Manufacturers

LYNN D. DUDLEY
Vice President and Senior Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700
Attorney for Amicus Curiae American Benefits Council

CATHERINE CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230
Attorney for Amicus Curiae American Benefits Council

MARK J. UGORETZ
THE ERISA INDUSTRY COMMITTEE
1400 L Street, N.W.
Suite 350
Washington, D.C. 20005
(202) 789-1400
Attorney for Amicus Curiae The ERISA Industry Committee

March 21, 2003

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act (ADEA) provides a cause of action for a claim of "reverse discrimination" by an individual age 40 or over who claims that an older worker was treated more favorably.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	4
SUMMARY OF REASONS FOR GRANTING THE WRIT	5
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE SEVENTH AND OTHER CIRCUITS THAT HAVE CONCLUDED THAT THE ADEA DOES NOT SUPPORT A CLAIM FOR "REVERSE" DISCRIMINATION, AS WELL AS THIS COURT'S PRONOUNCEMENTS ON THE PROPER INTERPRETATION OF THE ADEA	6
A. The Seventh Circuit Has Held That Reverse Discrimination Claims Are Not Cognizable Under the ADEA	6
1. The plain language of the ADEA precludes reverse discrimination claims	6
2. The ADEA legislative history does not support reverse discrimination claims	8
B. The First and Ninth Circuits Also Cast Considerable Doubt on the Availability of a Claim for Reverse Discrimination Under the ADEA	9

TABLE OF CONTENTS—Continued

Page

C. The Decision Below Is Inconsistent, and Arguably Conflicts, With This Court's Prior Pronouncements on the Proper Interpretation of the ADEA 10

II. THE DECISION BELOW CREATES SIGNIFICANT UNCERTAINTY IN AN AREA OF SUBSTANTIAL IMPORTANCE TO EMPLOYERS 13

A. The Decision Below Jeopardizes Employer-Sponsored Benefit Plans 13

B. The Decision Below Subjects Employers to Significantly More, and Potentially Conflicting, Discrimination Claims Over Personnel Actions 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page

EEOC v. Wyoming, 460 U.S. 226 (1983) 5, 12

Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992) 5, 6, 7, 8

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 5, 11, 12, 19

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 5, 10, 11

Parker v. Wakelin, 882 F. Supp. 1131 (D. Me. 1995) 10

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 8

Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988) 5, 9, 10

Sitko v. Goodyear Tire & Rubber Co., No. 02-4083 (6th Cir.) 19

Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000) 19

Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995) 5, 10

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) 7

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 18

FEDERAL STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq* ..... *passim*

29 U.S.C. § 623(l)(1)(A) 15

Internal Revenue Code

26 U.S.C. § 401(a)(28)(B)(iii) 16

TABLE OF AUTHORITIES—Continued

	Page
Older Workers Benefit Protection Act of 1990, P.L. 101-433	9
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	17
FEDERAL REGULATIONS	
26 C.F.R. § 1.401(a)(4)-8(b)	16
29 C.F.R. § 1625.2(a)	8
LEGISLATIVE HISTORY	
133 Cong. Rec. H16,170 (daily ed. Dec. 4, 1967)	8
136 Cong. Rec. H8614 (daily ed. Oct. 2, 1990)	9
H.R. Rep. No. 90-805 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213	8
MISCELLANEOUS	
The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey (Dec. 2002)	14, 15
Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002)	17
United States Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. (1965)	12

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN BENEFITS COUNCIL, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council, LPA, Inc., The Chamber of Commerce of the United States, the National Association of Manufacturers, the American Benefits Council, and The ERISA Industry Committee respectfully submit this brief *amici curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations, which collectively employ more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, Inc. ("LPA") is a public policy advocacy organization representing corporate executives responsible for human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion about current situations and emerging trends in labor and employment policy. LPA members are typically companies with business operations in the United States that have more than $750 million in revenues and more than 2,500 employees. The total number of persons employed by LPA member companies in the United States is nearly 13 million Americans, more than 12 percent of the private sector work force. A large share of LPA members currently provide retiree health care for their employees. In light of rapidly increasing health care costs, LPA has a keen interest in ensuring that the ADEA provides sufficient flexibility with respect to health benefits, thus enabling employers to provide some measure of coverage in the future.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association. NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The American Benefits Council ("ABC") is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, ABC members either sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. All of ERIC's members do business in more than one state, and many have employees in all fifty states. ERIC frequently participates as *amicus* in cases with the potential for far-reaching effect on employee benefit plan design or administration.

All of EEAC's, LPA's, and ERIC's members, and many of the members of the Chamber, ABC, and NAM are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, *amici's* members have a strong interest in the issue presented for the Court's consideration—whether the ADEA provides a cause of action for "reverse" discrimination for someone who claims that an older worker was treated more favorably.

Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, *amici* are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Under the collective bargaining agreement negotiated between petitioner General Dynamics Land Systems, Inc. ("General Dynamics") and the United Auto Workers ("UAW") that was in effect prior to July 1, 1997, General Dynamics provided full health insurance benefits to retired workers with 30 years of seniority. Petitioner's Appendix, at 3a. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement, which obligated General Dynamics to offer retiree health benefits only to employees who were at least 50 years old as of July 1, 1997, the date the new agreement took effect. *Id.*

The respondents are current and former employees of General Dynamics who were between 40 and 50 years old on July 1, 1997. *Id.* Each of the respondents would have been eligible for retiree health benefits under the collective bargaining agreement in effect before July 1, 1997, but did not qualify for benefits under the new agreement. *Id.* Respondents sued General Dynamics, alleging that limiting the availability of retiree health benefits to employees 50 years old and over constituted age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*.

The United States District Court for the Northern District of Ohio dismissed respondents' complaint. The district court reasoned that an allegation that older workers received more favorable treatment than younger workers was a claim for "reverse" age discrimination, which was not actionable under the ADEA. Pet. App. 4a. A divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed. In the majority's view, the statute bars employment discrimination against any individual 40 or older on the basis of age, regardless of whether older or younger workers received more favorable treatment.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below is inconsistent with the decisions of the Seventh and other circuits that have concluded that the ADEA does not support a claim for "reverse" discrimination. In *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), the Seventh Circuit held that the plain language of the ADEA and legislative history mandate that reverse discrimination claims are not cognizable under the ADEA. In addition, the First and Ninth Circuits also have cast considerable doubt on the availability of a claim for reverse discrimination under the ADEA. *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988); *Stone v. Travelers Corp.*, 58 F.3d 434 (9th Cir. 1995).

The Sixth Circuit's decision also is inconsistent, and arguably conflicts, with this Court's prior rulings on the proper interpretation of the ADEA. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), this Court ruled that a plaintiff need show only that he was replaced by someone who was *substantially younger* in order to establish an inference of age discrimination under the ADEA. The focus on the plaintiff's older age relative to his replacement indicates that the action must favor someone *younger* than the plaintiff to be unlawful under the ADEA.

The Sixth Circuit also ignored *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which this Court recognized that Congress intended, in passing the ADEA, to protect older workers from harmful stereotypes that their ability to work declines with advancing age. Nor did the appeals court adequately address the considerable legislative history this Court discussed in *EEOC v. Wyoming*, 460 U.S. 226 (1983), showing that Congress did not mean to prohibit employment actions that favor older workers.

In addition, the decision below creates significant uncertainty in an area of substantial importance to employers.

In particular, the decision below jeopardizes employer-sponsored benefit plans. By forcing employers to reevaluate common employer practices that benefit older workforce employees, such as enhanced retiree health programs and pension plans, the decision below could have the perverse effect of reducing the availability of such benefits for all workers. In addition, the decision below also subjects employers to significantly more, and potentially conflicting, discrimination claims over their personnel actions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE SEVENTH AND OTHER CIRCUITS THAT HAVE CONCLUDED THAT THE ADEA DOES NOT SUPPORT A CLAIM FOR "REVERSE" DISCRIMINATION, AS WELL AS THIS COURT'S PRONOUNCEMENTS ON THE PROPER INTERPRETATION OF THE ADEA

A. The Seventh Circuit Has Held That Reverse Discrimination Claims Are Not Cognizable Under the ADEA

1. The plain language of the ADEA precludes reverse discrimination claims

The decision below directly conflicts with the decision of the U.S. Court of Appeals for the Seventh Circuit, which ruled in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), that the ADEA does not support a claim for reverse age discrimination. In that case, Caterpillar offered early retirement benefits to workers who were either 60 years or older with 10 years of service, or 55 years or older, if the sum of their years of service and age totaled 85. Caterpillar later modified this plan to extend early retirement benefits also to workers who were 50 years or older with 10 years of service.

A group of former employees between the ages of 40 and 50 years old who had more than 10 years of service sued Caterpillar for reverse age discrimination because they were *too young* to qualify for the benefits. The district court ruled that the ADEA does not recognize a cause of action for reverse age discrimination. The Seventh Circuit affirmed.

The Seventh Circuit said the plain language of the ADEA indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored. In the congressional statement of findings and purpose at the beginning of the ADEA, Congress specifically referred to the problems faced by "older workers" and "older persons," particularly "relative to the younger ages" as the motivation for the statute. 29 U.S.C. § 621. To the Seventh Circuit, this language clearly indicates Congress's intent to protect workers who were discriminated against *because they were too old*, not because they were too young.

> [T]he phrase "arbitrary age discrimination" refers to Congress's understanding that discriminating against *older people* on the basis of their age is arbitrary . . . Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young . . . cannot argue that they are similarly victimized.

966 F.2d at 1228 (citation omitted).

These statements of legislative findings demonstrate that Congress did not intend to allow *every* worker age 40 and over to claim age discrimination simply because she or he is a member of the ADEA-protected class, the court held. Rather, the statute prohibits employers from arbitrarily favoring younger workers over older ones based on inaccurate and harmful stereotypes that as individuals age, they become less able in the workplace. *Cf. Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (1999) (relying on legislative findings enacted

as part of the Americans with Disabilities Act to show congressional intent).[2]

2. The ADEA legislative history does not support reverse discrimination claims

As the Seventh Circuit noted, "[t]here is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young*." 966 F.2d at 1228. Indeed, the legislative history is replete with explanations that the primary purpose of the bill was to promote employment opportunities for *older* workers.[3] The congressional debate accompanying passage of the ADEA reveals the intent to combat inaccurate and harmful stereotypes of an older worker as "an inflexible person, in physical decline, capable of only low productivity, [which] bars the employer from a fair evaluation of the applicant's actual ability and performance record." 133 Cong. Rec. H16,170 (daily ed. Dec. 4, 1967) (statement of Rep. Olsen).

In fact, Congress deliberately chose not to establish an age threshold lower than 40 for membership in the protected class. Congress specifically felt "a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers." H.R. Rep. No. 90-805, at 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219. By recognizing

---

[2] The Seventh Circuit also rejected a regulation promulgated by the Equal Employment Opportunity Commission (EEOC) at 29 C.F.R. § 1625.2(a) interpreting the ADEA as supporting a claim for reverse age discrimination because it conflicted with the statute. 966 F.2d at 1228. As this Court held in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989), "no deference is due to agency interpretations at odds with the plain language of the statute itself."

[3] *See, e.g.*, H.R. Rep. No. 90-805, at 4, 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214-17.

reverse discrimination claims under the ADEA, the decision below similarly frustrates the primary goal of the ADEA to protect older workers.

When Congress amended the ADEA by passing the Older Workers Benefit Protection Act of 1990 (OWBPA), P.L. 101-433, it was understood that the ADEA did not require employers to provide the same benefits for younger workers in the ADEA-protected class as older workers. For example, in describing a "wide variety" of early retirement incentives that were lawful under the ADEA even prior to the OWBPA amendments, the Statement of Managers that accompanied the Act noted that the ADEA allows "a plan that gives employees who have attained age 55 and who retire during a specified window period credit for 5 additional years of service and/or age. . . ." 136 Cong. Rec. H8614, H8619 (daily ed. Oct. 2, 1990) (Statement of Managers). The example is premised on the interpretation that the ADEA allows an employer to limit employee benefit enhancements to workers who are age 55 and older. In contrast, the Sixth Circuit's interpretation would require that benefits be uniform for all workers in the ADEA-protected class.

B. The First and Ninth Circuits Also Cast Considerable Doubt on the Availability of a Claim for Reverse Discrimination Under the ADEA

The Sixth Circuit's decision also is incompatible with the First Circuit's ruling in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988). In that case, the First Circuit rejected an older worker's claim that a company severance plan, which gave greater benefits to workers with more seniority, violated the ADEA by inducing him to resign.

In an opinion written by then-Judge Breyer, the First Circuit held that the ADEA "does not forbid treating older persons *more* generously than others." *Id.* at 278. The court

explained that a company severance incentive package that offered increased benefits to more senior employees who resigned voluntarily was a *favor* to them, and thus could not support an age discrimination claim. "That plan was a carrot, not a stick, and . . . a 'carrot' cannot ordinarily violate the Age Discrimination in Employment Act." *Id.* (citation omitted); *see also Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995) (dismissing ADEA reverse age discrimination lawsuit by teachers between ages of 40 and 50, who were too young to vest in retirement benefits).

In addition, the Ninth Circuit expressed considerable doubt that the ADEA supports a claim for reverse age discrimination in *Stone v. Travelers Corp.*, 58 F.3d 434 (9th Cir. 1995). In that case, a company severance plan permitted only employees over the age of 55 to receive their benefits as a lifetime annuity. The plaintiff, who was 52 years old, claimed discrimination because he was too young to receive an annuity. Although the Ninth Circuit did not rule on the viability of the plaintiff's reverse age discrimination claim, it described the nature of his claim with disbelief: "Stone claims that Travelers violated the ADEA by discriminating against him because he was too young!" *Id.* at 437.

C. The Decision Below Is Inconsistent, and Arguably Conflicts, With This Court's Prior Pronouncements on the Proper Interpretation of the ADEA

This Court ruled in its unanimous opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), that the appropriate test for illegal age discrimination under the ADEA is the replacement of the plaintiff by someone who is *substantially younger*, but who need not be outside the protected class, *i.e.*, under 40 years of age. "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially

younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id.* at 313.

The Court observed that a test which merely looked at whether or not the comparator is in the protected class would permit a 40-year-old plaintiff who is replaced by a 39-year-old to claim age discrimination simply because the plaintiff is one year older. In practice, the Court said, this type of case was rare, "since the vast majority of age-discrimination claims come from *older employees*." *Id.* at 312 (emphasis added). Nevertheless, the Court rejected this standard as a reliable indicator of age bias.

Requiring a comparison to a substantially younger worker to establish a prima facie case of age discrimination thus shows that the term "older employee" means *older than the comparator*. The Court's distinction between 40-year-olds, who are part of the ADEA's protected class, and "older employees" also shows that the word "older" is a comparative term. "Older" refers to one's age when compared to someone else's, not just to one's chronological age. The Court's focus in *O'Connor* on the plaintiff's older age relative to his replacement thus shows that discrimination must be in favor of someone *younger* than the plaintiff to be unlawful under the ADEA, an essential point absent in the decision below.

Moreover, this Court explicitly recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that Congress intended the ADEA to protect older workers from inaccurate and damaging stereotypes about their ability to work. In *Hazen Paper*, the Court described "the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . Congress' [sic] promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and

stigmatizing stereotypes." 507 U.S. at 610 (citation omitted). The decision below, however, conflicts with this Court's interpretation of the legislative intent underlying the ADEA.

Moreover, the extensive legislative history on which this Court relied in *EEOC v. Wyoming*, 460 U.S. 226 (1983), to hold that the ADEA covered state and local governments, also supports the proposition that the ADEA was designed to protect "older" workers vis-à-vis younger ones. The Court specifically cited with approval the findings of a 1965 report by then-Labor Secretary W. Willard Wirtz on older American workers that showed age discrimination "was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. . . ." *Id.* at 231.[4]

The Secretary's Report detailed the problems facing older workers in the U.S., where over half of all employers used an age ceiling from 45 to 55 when hiring new employees, regardless of the applicant's qualifications, and workers over 55 years of age were automatically excluded from over one half of all job openings in private companies. Secretary's Report, at 6. The Secretary also noted that workers age 45 and over were unemployed for eight weeks longer than workers under age 45. *Id.* at 18. The Secretary's conclusion that workers were having more difficulty obtaining new jobs as they grew older thus was a compelling reason for enacting the ADEA.

---

[4] United States Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-219 (1965) (hereinafter cited as "Secretary's Report").

The decision below thus conflicts with the decisions of the Seventh and other circuits, as well as this Court's prior pronouncements on the proper scope of the ADEA, and thereby warrants this Court's review.

II. THE DECISION BELOW CREATES SIGNIFICANT UNCERTAINTY IN AN AREA OF SUBSTANTIAL IMPORTANCE TO EMPLOYERS

A. The Decision Below Jeopardizes Employer-Sponsored Benefit Plans

The Sixth Circuit's ruling is fundamentally inconsistent with the operation of employee benefit plans offered by *amici's* member companies. *Amici's* member companies conduct business in multiple states across the nation, and they seek to establish uniform policies and employee benefit plans that are consistent with the federal employment nondiscrimination laws. This effort is undermined if there is inconsistency and instability in the federal employment laws that apply to employees located at different geographic locations. Simply put, employers cannot develop uniform and rational retirement and welfare programs for their workers across the country if they face claims for reverse age discrimination by employees who work at sites located in the Sixth Circuit.

The most profound effect of the Sixth Circuit's ruling would arise under employer welfare arrangements, including retiree health programs. The ruling calls into question common employer practices that benefit the oldest workforce employees. For example, employers may provide enhanced welfare benefits (such as severance pay or medical coverage) to older employees in the ADEA-protected class when there is a reduction in the workforce or a fundamental change in the employer's benefit program. An employer that has a reduction in force might provide a higher level of subsidy or enhancement in medical coverage to older departing employees,

e.g., age 50 or older, in an effort to help bridge these workers until they become eligible to receive pension benefits or Medicare coverage. Like General Dynamics, employers forced to reduce future retiree health benefits may elect to keep the same level of retiree health benefits or provide a better transition benefit for older employees while applying the new terms to all other workers. The employer's decision to provide greater benefits to those workers who are at or closer to retirement age recognizes that, as a practical matter, older workers may be impacted more significantly by benefit changes. They may have fewer years left in the workforce to make up for the reduction in future benefits. Workers on the cusp of pension eligibility may have begun to plan their retirement in anticipation of receiving retiree medical coverage. While such voluntary enhancements or transition benefits are highly beneficial to older workers, they would not appear to be lawful under the Sixth Circuit ruling.

If the Sixth Circuit's ruling stands, it could have the perverse effect of further reducing the availability of retiree health benefits for all workers. A 2002 nationwide survey of 435 large employers revealed that the cost of providing retiree health benefits increased an estimated 16% last year, from $12.5 billion in 2001 to an estimated $14.5 billion in 2002. *The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey* (Dec. 2002) (hereinafter referred to as the "Kaiser/Hewitt Survey").[5] Together, these employers offer health benefits to approximately 18.5 million workers and family members and 5.4 million retirees and family members. *Id.* at 58. For them, the increase in the cost of providing retiree health benefits outpaced that of providing health benefits to active workers. *Id.* at 10. Rising costs already have caused some employers with fixed budgets to modify their retiree health coverage.

[5] The survey is available at *http://www.kff.org/content/2002/20021205a/6061v4.pdf.*

Over the past few years, many large employers already have raised retiree contributions to premiums and the amounts of the insureds' deductibles and co-payments. *Id.* at 37-38.

The increased likelihood that employers will face lawsuits under the ADEA over *any* differential in their benefit plans, including those that actually favor their oldest workers, will exacerbate the pressure to control cost by eliminating these programs altogether. Even if the employer ultimately prevails, mounting a defense to an ADEA lawsuit can be prohibitively expensive.

To minimize this risk, prudent employers simply may choose not to offer benefits that are likely to be challenged, such as retiree health insurance. In fact, 13 percent of the large employers surveyed already have terminated health benefits for *future* retirees (often new or recent hires) in the past two years, and 22 percent predicted that they were likely to do the same in the next three years. *Kaiser/Hewitt Survey*, at 37, 43. Exposing employers that provide retiree health benefits to greater risk of litigation may drive more employers to scale back further their coverage or abandon it altogether.

While the Sixth Circuit's ruling affects retiree health and employer welfare plans most dramatically, *amici*'s member companies also have concerns about the operation of their employee benefit pension plans if reverse age discrimination is a cognizable claim under the ADEA. Under current law, section 623(l)(1)(A) of the ADEA allows employee benefit pension plans to condition the payment of normal or early retirement benefits on the attainment of a certain age. 29 U.S.C. § 623 (l)(1)(A). Presumably, this specific exception for pension plans would not be affected by the Sixth Circuit's ruling.

Retirement plans may include other provisions contingent upon age, however, that may not be covered by the exception in § 623(l). For example, in defined contribution plans, such

as a "401(k)" or similar arrangements, some plans may limit the ability to take in-service withdrawals before retirement to participants who have attained age 50 or above. Another example is the Internal Revenue Code provision requiring certain tax-qualified plans holding employer securities to allow participants who have attained age 55 and have 10 years of participation to diversify the assets in which their accounts are invested. 26 U.S.C. § 401(a)(28)(B)(iii). There may be uncertainty as to whether a plan that incorporates the Internal Revenue Code § 401(a)(28) rule violates the ADEA by not providing similar diversification rights to younger workers in the ADEA-protected class.

In addition, the Sixth Circuit's ruling also casts doubt on another common practice that is recognized by Treasury Department regulations. Many defined contribution plans (including target benefit plans) are "age-weighted" so that larger contributions are made for older participants than for similarly-situated younger employees. *See, e.g.*, 26 C.F.R. § 1.401(a)(4)-8(b). Whether plans that contain this feature unlawfully discriminate against younger workers in the ADEA-protected class is also unclear under the Sixth Circuit's decision.

If, as the Sixth Circuit's rulings suggests, the benefits, rights and features in employee benefit plans must be uniform for all employees age 40 and over, numerous plan designs that have long been assumed to be lawful under the ADEA now would need to be reconsidered. The end result may be a diminution of the benefits that are provided to the oldest employees in the workforce, a perverse outcome under a statute that was intended to protect older employees.

B. The Decision Below Subjects Employers to Significantly More, and Potentially Conflicting, Discrimination Claims Over Personnel Actions

The Sixth Circuit's decision will increase significantly the pool of potential claimants alleging age discrimination, and

thus the number of claims to which employers must respond. Unlike the immutable characteristics covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, age is a progressive condition that affects everyone. Most workers eventually will attain the age of 40, joining the growing class of individuals protected under the ADEA. On average, 11,684 people (5816 men and 5868 women) in the United States will turn 40 every day in 2003.[6] By expanding the ADEA to include reverse age discrimination claims, the Sixth Circuit allows every one of these workers to look at their older co-workers in addition to younger ones as potential comparators, vastly increasing the number of potential claims they can make.

Collectively, *amici's* member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with Title VII, the ADEA, and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. This prospect is true because each time an employer makes a decision to hire an applicant or promote an employee, for example, there is likely to be at least one candidate who was not selected for the job. If the candidate is substantially older than the individual selected, the candidate probably can establish a prima facie case of age discrimination. The decision below allows candidates who are substantially *younger* than the person selected also to establish a prima facie case of age discrimination in the Sixth Circuit as well.

---

[6] Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002) (microdata records public use file at *http://www.bls.census.gov/cps/cpsmain.htm*).

Almost every applicant or employee can identify a comparator who is *either* older or younger, and who allegedly was treated differently. That means virtually every plaintiff will be able to establish a prima facie case of discrimination, thereby shifting the burden to the employer to articulate a legitimate, nondiscriminatory reason for the employment action that the plaintiff may attempt to show is a pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The decision below could lead to absurd results. For example, an employer that hires a 50 year old from a pool of applicants of various ages may receive multiple claims of age discrimination, all challenging a single employment action. Some plaintiffs may allege they were not hired because they were too old while others claim they were rejected because they were too young. As long as a substantial age difference existed between the person selected and the plaintiff, both older and younger plaintiffs probably would establish a prima facie case of age discrimination under the Sixth Circuit's standard. Thus, an employer could be sued for discriminating against both older and younger applicants at the same time.

Although the prima facie test is not an onerous one, it does weed out clearly unmeritorious claims. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). However, under the Sixth Circuit's ruling, the only time the prima facie case would not exist is if the comparator were approximately the same age as the plaintiff, which is highly unlikely. Therefore, employers operating in the Sixth Circuit will be forced to defend themselves against significantly more age discrimination complaints than businesses located in other jurisdictions. While these employers ultimately may be able to articulate legitimate, nondiscriminatory reasons for their employment actions, they still must undergo a lengthy and expensive process to refute each charge of discrimination.

Moreover, as a practical matter, the Sixth Circuit's decision effectively eliminates an important defense for employers to an age discrimination suit. One way an employer may defend against a claim under the ADEA that it discriminated against an older worker because of his age is to show that it actually treated the older worker *better* than a younger one. In *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420 (4th Cir. 2000), for example, the Fourth Circuit held the employer did not violate the ADEA by requiring the 56 year old plaintiff to choose between receiving a lump-sum severance payment or a special retirement option as part of a lay off. As the court pointed out, the plaintiff was treated *better* than his younger co-workers, who received only the severance benefit. *Id.* at 426.

While this defense may defeat the older worker's age discrimination claim, it also would *prove* a reverse discrimination claim by a younger employee who is within the ADEA-protected class under the Sixth Circuit's decision. The potential liability for reverse age discrimination created by this defense may lead employers to forsake the defense completely.[7] Review of the Sixth Circuit's decision by this

[7] The Sixth Circuit's recognition of a cause of action for reverse age discrimination poses problems not only for employers defending against disparate treatment cases, but also where a plaintiff alleges a disparate impact based on age. This Court has never recognized that a disparate impact cause of action exists under the ADEA. *Hazen Paper*, 507 U.S. at 610. Likewise, the Sixth Circuit has not ruled on the viability of a disparate impact claim under the ADEA. That court, however, is currently considering on appeal a case that raises this issue. *Sitko v. Goodyear Tire & Rubber Co.*, No. 02-4083 (6th Cir.).

If the Sixth Circuit were to rule that disparate impact claims are cognizable under the ADEA, allowing "reverse" age discrimination would only complicate matters. To monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, both older and younger. This analysis would be overly burdensome on employers, and ultimately meaningless. Since the age of

Court is thus necessary to address the increased number of, and potentially conflicting, discrimination claims employers undoubtedly will face.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

---

the employee population is constantly changing, developing an accurate picture of the effect of a particular employment practice on employees of different ages will be impossible.

Respectfully submitted,

DANIEL Y. YAGER
TIMOTHY J. BARTL
LPA, INC.
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8670

Attorneys for Amicus Curiae LPA, Inc.

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN D. BRYANT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W
Washington, D.C. 20062
(202) 463-5337

Attorneys for Amicus Curiae The Chamber of Commerce of the United States

LYNN D. DUDLEY
Vice President and Senior Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

Attorney for Amicus Curiae American Benefits Council

CATHERINE CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230

Attorney for Amicus Curiae American Benefits Council

ANN ELIZABETH REESMAN
KATHERINE Y.K. CHEUNG
Counsel of Record
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1615 H Street, N.W.
Washington, D.C. 20004
(202) 637-3000

Attorneys for Amicus Curiae National Association of Manufacturers

MARK J. UGORETZ
THE ERISA INDUSTRY COMMITTEE
1400 L Street, N.W.
Suite 350
Washington, D.C. 20005
(202) 789-1400

Attorney for Amicus Curiae The ERISA Industry Committee

March 21, 2003

MOTION FILED
MAR 2 4 2003

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

THOMAS C. NYHAN
Executive Director/ General Counsel
JAMES P. CONDON
Deputy General Counsel
JOHN J. FRANCZYK, JR.*
Associate General Counsel
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Amicus Curiae Central States, Southeast and Southwest Areas Health and Welfare Fund

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

16 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Central States, Southeast and Southwest Areas Health and Welfare Fund ("Central States") sought consent from the parties to this proceeding to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari. Petitioner has consented to the filing but Respondents have declined to consent. Accordingly, for the reasons stated below, Central States moves this Court pursuant to Rule 37 of the Rules of the Supreme Court of the United States for leave to file an *amicus curiae* brief in support of the Petitioner.

Central States is an "employee welfare benefit plan," and "employee benefit plan," and a "multiemployer plan" within the meaning of Sections 3(1), 3(3), and 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1), 1002(3), and 1002(37)(A). Central States provides health benefits to approximately 100,000 active participants and 25,000 retirees. In general terms, the cost of providing health coverage increases as participants get older. Thus, the cost of providing health coverage to retirees is relatively high as compared to active participants (who have a much younger average age as a group). Within each group, average costs increase as well depending upon the age of the participant and retiree.

Because the average cost of providing health coverage in general, and to retirees in particular, is growing at an astronomical rate, an employee welfare plan such as Central States has only three options. First, Central States could eliminate coverage for retirees which would, in many instances, eliminate the only affordable health coverage that the retirees could acquire. Second, Central States could charge a premium to the retirees reflecting the full cost of providing health coverage. However, this cost would be prohibitively high for most of the retirees. Third, Central

States could charge higher premiums to younger active participants or younger retirees in order to subsidize the cost of the health coverage provided to the retiree.

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 621-634, contains provisions that have bearing on the provision of welfare benefits and pension benefits by employers. For example, Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), allows an employer to observe the terms of a bona fide employee benefit plan where the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. Other examples are Sections 4(i) and 4(l) of the ADEA, 29 U.S.C. §§ 623(i) and 623(l), which allow pension plans to contain various age-based terms. Prior to the decision below, health benefit plans believed (and courts held) that discrimination *in favor of* older persons did not violate the ADEA. The decision below, if left intact, will make it difficult, if not impossible, for health plans to continue to provide retiree health coverage (at least without making the premiums cost prohibitive to the retirees), to the extent discriminating *in favor of* older persons is a violation of the ADEA. Such an interpretation of the ADEA is contrary to the language in the ADEA which states that the ADEA's goal is to protect older workers.

Central States has specialized experience in administering an ERISA health plan that is national in scope. Further, Central States is jointly administered with the largest multi-employer pension plan in the United States, the Central States, Southeast and Southwest Areas Pension Fund, giving Central States experience in administering an ERISA pension plan as well. The expertise that Central States has in dealing with ERISA matters will provide a perspective that is different than the parties and, more important, allows Central States to identify the dangers and flaws of the decision below that have an impact far greater than on the parties themselves. For these reasons, Central States requests that this Court grant Central States' Motion for Leave to File Brief *Amicus Curiae*.

Respectfully submitted,

THOMAS C. NYHAN
Executive Director/
General Counsel
JAMES P. CONDON
Deputy General Counsel
JOHN J. FRANCZYK, JR.*
Associate General Counsel
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
HEALTH AND WELFARE FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Amicus Curiae
Central States, Southeast and
Southwest Areas Health and
Welfare Fund

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF CENTRAL STATES	1
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Cline v. General Dynamics Land Systems, Inc., 296 F.3d 466 (6th Cir. 2002)	3, 4, 7
Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995)	8
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)	6
Fort Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641 (1990)	8
Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992)	3
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	5
Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988)	7, 8
Keene Corp. v. United States, 508 U.S. 200 (1993)	6
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)	4
Lyon v. Ohio Educ. Ass'n & Professional Staff Union, 53 F.3d 135 (6th Cir. 1995)	7, 8
O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)	5
Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988)	3
United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001)	4
CONSTITUTIONAL PROVISIONS	
U.S. Const. Art. I, § 2, cl. 2	6
U.S. Const. Art. I, § 3, cl. 3	6
U.S. Const. Art. II, § 1, cl. 5	6

TABLE OF AUTHORITIES—Continued

STATUTES	Page
29 U.S.C. § 621	2, 4, 5
29 U.S.C. § 623(a)(1)	4
29 U.S.C. § 623(f)(2)(B)(i)	2
29 U.S.C. § 623(i)	2
29 U.S.C. § 623(l)	2
29 U.S.C. § 623(l)(1)(A)	4
29 U.S.C. § 1002(1)	1
29 U.S.C. § 1002(3)	1
29 U.S.C. § 1002(37)(A)	1
REGULATIONS	
29 C.F.R. § 1625.2(a)	4, 6
29 C.F.R. § 1625.2(b)	7

IN THE

Supreme Court of the United States

No. 02-1080

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF CENTRAL STATES

Central States is an "employee welfare benefit plan," and "employee benefit plan," and a "multiemployer plan" within the meaning of Sections 3(1), 3(3), and 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1), 1002(3), and 1002(37)(A).[1] Central States provides health benefits to

[1] Pursuant to Rule 37.6, Central States represents that this brief has been authored solely by counsel for Central States and no party other than Central States has made a monetary contribution for the preparation or submission of this brief.

approximately 100,000 active participants and approximately 25,000 retirees. In general terms, the cost of providing health coverage increases as participants get older. Thus, the cost of providing health coverage to retirees is relatively high as compared to active participants (who have a much younger average age as a group). Within each group, average costs increase as well depending upon the age of the participant and retiree.

Because the average cost of providing health coverage in general, and to retirees in particular, is growing at an astronomical rate, an employee welfare plan such as Central States has only three options. First, Central States could eliminate coverage for retirees which would, in many instances, eliminate the only affordable health coverage that the retirees could acquire. Second, Central States could charge a premium to the retirees reflecting the full cost of providing health coverage. However, this cost would be prohibitively high for most of the retirees. Third, Central States could charge higher premiums to younger active participants or younger retirees in order to subsidize the cost of the health coverage provided to the retiree.

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 621-634, contains provisions that have bearing on the provision of welfare benefits and pension benefits by employers. For example, Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), allows an employer to observe the terms of a bona fide employee benefit plan where the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. Other examples are Sections 4(i) and 4(l) of the ADEA, 29 U.S.C. §§ 623(i) and 623(l), which allow pension plans to contain various age-based terms. Prior to the decision below, health benefit plans believed (and courts held) that

discrimination *in favor of* older persons did not violate the ADEA. The decision below, if left intact, will make it difficult, if not impossible, for health plans to continue to provide retiree health coverage (at least without making the premiums cost prohibitive to the retirees), to the extent discriminating *in favor of* older persons is a violation of the ADEA. Such an interpretation of the ADEA is contrary to the language in the ADEA which states that the ADEA's goal is to protect older workers.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding in *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002), that the ADEA prohibits reverse age discrimination, conflicts with the Seventh Circuit's holding to the contrary in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992); *see also Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.) (stating that the ADEA "does not forbid treating older persons *more* generously than others"). The conflict created by the decision below should be resolved by this Court because the Sixth Circuit's holding that the ADEA prohibits discrimination *in favor of* older workers has consequences far beyond the specific context of the case before the Court. This conflict raises concrete issues for Central States and other health plans that cover participants who reside in both the Sixth and Seventh Circuits. Specifically, the decision will make it difficult, if not impossible, for health plans to provide health coverage to older workers, as well as retirees, because many plans depend on younger workers to subsidize the cost of providing coverage to older workers. Moreover, as demonstrated below, the Sixth Circuit's result cannot be squared with a reading of the ADEA in its entirety.

The Sixth Circuit relied on two principal arguments in support of its conclusion that the ADEA prohibits reverse age discrimination. First, the Sixth Circuit relied on the argument

that the ADEA prohibits discrimination against any individual because of such individual's age. *Cline*, 296 F.3d at 469; 29 U.S.C. § 623(a)(1). Although the Sixth Circuit acknowledged that the statute also expresses that the purpose of the statute is to protect older workers, 29 U.S.C. § 621, the Sixth Circuit believed that the specific language of the statute governed over the more general provision. *Cline*, 296 F.3d at 470-71. Second, the Sixth Circuit relied upon the argument that a regulation promulgated by the EEOC, 29 C.F.R. § 1625.2(a), indicates that discrimination is prohibited by the ADEA even if the discrimination is in favor of an older worker. *Cline*, 296 F.3d at 471. The concurrence relies on yet a third argument, namely, that the provision in the ADEA which allows an employer to set a minimum age as a condition for eligibility in a pension plan, 29 U.S.C. § 623(l)(1)(A), would be meaningless if discrimination against younger employees was not prohibited by the ADEA. *Cline*, 296 F.3d at 473 (Cole, J., concurring). However, none of these arguments withstands close scrutiny.

The Sixth Circuit was certainly correct in stating, as a general interpretive principle, that the specific language of the statute governs the general. However, the Sixth Circuit ignored the canon that interpretation of a statute is a holistic endeavor and that the meaning of one provision of the statute must be compatible with the rest of the law. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001). Although the Sixth Circuit correctly noted that the ADEA's protected class of individuals is limited to those individuals 40 years old and older, the Sixth Circuit did not fully explore the implication of this fact. As this Court has held, age is not a suspect classification under the Equal Protection Clause. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000). However, even though rational basis review does not require that age distinctions and the legitimate interests they serve match with razorlike precision, *id.*, there must still be rational connection between the policy

underlying the age discrimination and the interest sought to be served.

In this case, Congress sought to protect older workers in enacting the ADEA. 29 U.S.C. § 621. However, it did not seek to do so in a vacuum. As this Court has previously recognized, Congress enacted the ADEA to counteract the effect of "inaccurate and stigmatizing stereotypes" that the performance of older workers was not as good as that of younger workers. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993). Under rational basis review, Congress was certainly free to create a protected class of individuals 40 and older because Congress believed that this class of individuals was most likely to be the victims of such stereotypes. In contrast, it would not be rational for Congress to limit the protected class to individuals 40 and over if Congress intended to protect individuals because of their relative youth. In this scenario, the younger the worker, the more likely the worker would be subject to such discrimination, meaning that limiting the protected class to individuals 40 and over would be entirely irrational. Just as this Court recognized in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-13 (1996), the difference in age between a plaintiff and the person who replaced him, not the age of the worker or his replacement, is a reliable indicator of age discrimination. The relevant test under the ADEA for whether an employee was discriminated against because he was too young would be if the employee was substantially younger than the person receiving more favorable treatment.

However, under the ADEA, such a result would be impossible because the younger employees would be outside the protected class. It is not rational to conclude that Congress sought to prevent discrimination against *younger* workers while at the same time limiting the protected class to those individuals 40 and older. It would be precisely those individuals *below* the age of 40 that would be more likely to

need such protection. In fact, although Congress found that discrimination against older workers was founded on inaccurate stereotypes, no such finding was made with respect to discrimination against younger workers. The Constitution itself "discriminates" against the young in various circumstances. U.S. Const. Art. I, § 2, cl. 2 (Representative must be 25 or older); U.S. Const. Art. I, § 3, cl. 3 (Senator must be 30 or older); U.S. Const. Art. II, § 1, cl. 5 (President and Vice-President must be 35 or older). If Congress felt that such "discrimination" against younger individuals was merely an inaccurate stereotype, certainly it would have made such belief plain. *Cf. Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (Court does not presume a change in existing substantive law unless intent to make such a change is clearly expressed). Thus, construing the ADEA to bar reverse discrimination when the class of persons protected is arbitrarily limited to those age 40 or above creates an irrationality that would call the ADEA's constitutionality into question. The Court should avoid such a construction of the statute that creates serious constitutional doubt unless such construction is plainly the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, however, the statute itself makes it clear that Congress' intent was to protect older workers from being discriminated against because of the inaccurate stereotype that older workers could not perform their jobs as well as younger workers. Nowhere is there any suggestion that Congress believed the converse to be true.

Second, the Sixth Circuit also relied upon the fact that the regulations, specifically 29 C.F.R. § 1625.2(a), indicate that an employer may not discriminate against persons in the protected class on the basis of age regardless of whether the discrimination is in favor of the older worker. From this, the Sixth Circuit concluded that the EEOC interpreted the statute to mean that discrimination in favor of older workers is

prohibited. However, the Sixth Circuit did not address the next subsection of the same regulation which provides in pertinent part:

> The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination.

29 C.F.R. § 1625.2(b). If, as the Sixth Circuit asserts, the statute prohibits age discrimination in favor of older employees, Section 1625.2(b) would not be permissible since it would not matter whether the discrimination was beneficial to older employees because it would still be discrimination. Yet Section 1625.2(b) implicitly recognizes that doing an act that would benefit older workers is *not* a violation of the ADEA even if the employer is using age as a criterion. In short, the regulations are far from clear in stating a coherent picture as to the meaning of the statute.

Third, the concurrence in *Cline* relied upon the fact that the ADEA permits a pension plan to use a minimum age requirement for eligibility in the plan. 29 U.S.C. § 623(l)(1)(A). From this fact, the concurrence reasoned that the ADEA must prohibit reverse age discrimination because otherwise there would be no need for such a provision. However, as demonstrated by cases such as *Lyon v. Ohio Educ. Ass'n & Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995), and *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), older workers may argue that setting a minimum age too low discriminates against older workers because it may allow younger workers to receive the same benefit as older workers even though the older workers have worked for the employer for a longer period of time. This provision of the ADEA, that was not even present until the ADEA was amended by OWBPA, reflects an abundance of caution to protect employers from claims such as those made

in the *Lyon* and *Karlen* cases. *Cf. Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 646 (1990) (recognizing that provisions may be added to statute out of an abundance of caution).

Finally, recognizing a claim of reverse age discrimination under the ADEA would undermine the goal of the ADEA to protect older workers. As noted by the Seventh Circuit in *Karlen*, recognizing reverse age discrimination claims would deter employers from offering programs that are beneficial to older workers. 837 F.2d at 317-18. Further, it would prevent health plans from using higher premiums from younger workers to subsidize benefits for older workers resulting either in eliminating coverage for older workers and retirees or increasing the premium for older workers and retirees to a cost prohibitive level. The ADEA should not be read in such a way as to defeat its goal of protecting older workers. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) (elementary rule of construction is that an act may not be construed to destroy itself).

CONCLUSION

For the reasons stated, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

THOMAS C. NYHAN
Executive Director/
General Counsel
JAMES P. CONDON
Deputy General Counsel
JOHN J. FRANCZYK, JR.*
Associate General Counsel
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
HEALTH AND WELFARE FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800
Attorneys for Amicus Curiae
Central States, Southeast and
Southwest Areas Health and
Welfare Fund

* Counsel of Record

No. 02-1080

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

MARK W. BIGGERMAN
Counsel of Record
REMINGER & REMINGER, CO., L.P.A.
1400 Midland Building
101 Prospect Ave.
Cleveland, OH 44115
(216) 687-1311

E. BRUCE HADDEN
HADDEN CO., L.P.A.
132 Northwoods Boulevard
Columbus, OH 43235
(614) 431-2000

JOANNE C. BRANT
KEVIN HILL
OHIO NORTHERN UNIVERSITY
Pettit College of Law
Ada, OH 45810
(419) 772-2228
(419) 772-2227

Counsel for Respondents

DONALD B. VERRILLI, JR.
Counsel of Record
DEANNE E. MAYNARD
JARED O. FREEDMAN
MARTINA E. VANDENBERG
JENNER & BLOCK, LLC
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

WILLIAM J. KILBERG
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 955-8500

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 16, 2003
CERTIORARI GRANTED APRIL 21, 2003

TABLE OF CONTENTS

Relevant docket entries, *Cline v. General Dynamics Land Systems Inc.*, Case No. 99-CV-7401 (N.D. Ohio) 1

Relevant docket entries, *Cline v. General Dynamics*, Docket No. 00-3468 (6th Cir.) 2

Amended Complaint for Declaratory Judgment and Money Damages with Jury Demand Attached, *Cline v. General Dynamics*, Case No. 99-CV-7401 (N.D. Ohio filed Sept. 7, 1999) 4

United States District Court
Northern District of Ohio (Toledo)
Case No. 99-CV-7401

Cline *et al.* v. General Dynamics Land Systems Inc.

June 24, 1999	Complaint
Sept. 29, 1999	Amended Complaint
Nov. 24, 1999	Motion by Defendants to Dismiss Plaintiff's Amended Complaint
Jan. 18, 2000	Opposition by Plaintiffs to Motion by Defendants to Dismiss Plaintiff's Amended Complaint
Feb. 7, 2000	Reply Memorandum by Defendant in Support of its Motion to Dismiss
Feb. 18, 2000	Sur-Reply by Plaintiffs to Defendant's Reply to Plaintiff's Memo Contra to Defendant's Motion to Dismiss Motion Reply
Mar. 10, 2000	Memorandum, Opinion, and Order: granting motion by defendants to dismiss plaintiffs' amended complaint
Mar. 10, 2000	Judgment
April 10, 2000	Notice of Appeal by Plaintiffs re Judgment Dismissing Case

United States Court of Appeals for the Sixth Circuit
Docket No. 00-3468
Cline v. General Dynamics

April 18, 2000	Civil Case Docketed
July 7, 2000	Proof Brief filed by E. Bruce Hadden and Mark W. Biggerman for Appellant Dennis Cline
Aug. 21, 2000	Proof Brief filed by Craig C. Martin for Appellee General Dynamics
Sept. 29, 2000	Proof Reply Brief filed by E. Bruce Hadden and Mark W. Biggerman for Appellant Dennis Cline
Oct. 6, 2000	Appendix filed by Mark W. Biggerman for Appellant Dennis Cline
Oct. 27, 2000	Final Brief filed by E. Bruce Hadden and Mark W. Biggerman for Appellant Dennis Cline
Oct. 27, 2000	Final Reply Brief filed by E. Bruce Hadden and Mark W. Biggerman for Appellant Dennis Cline
Oct. 30, 2000	Final Brief filed by Craig C. Martin for Appellee General Dynamics
Sept. 18, 2001	Cause Argued on 9/18/01
July 22, 2002	Opinion filed: Reversed and Remanded

July 22, 2002	Judgment: Reversed and Remanded
Aug. 5, 2002	Petition for en banc rehearing filed by Craig C. Martin for Appellee General Dynamics
Aug. 8, 2002	Letter sent by blh to Mark W. Biggerman for Appellant Dennis Cline notifying that party is directed to respond to a petition for en banc rehearing
Aug 22, 2002	Response to a petition for en banc rehearing filed by Mark W. Biggerman for Appellant Dennis Cline
Sept. 19, 2002	Order filed denying petition for en banc rehearing
Sept. 27, 2002	Mandate issued with no cost taxed

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Dennis Cline, John Alge, David Bayes, Gary Bish, Dan Brenamen, Lewis Browning, Anthony Ciminillo, Scott Danner, Hixey Deeble, Robert Dewald, Larry Dicke, Richard Dirmeyer, David Driggs, Ron Duran, Kenneth Emahiser, Donald Eversole, Earl Fast, Dennis Ferguson, Robert Feucht, William Fisher, Steven Flake, Vada Flinders, Robert Frye, Gregory Gebolys, Joseph Gibson, Robert Greenlee, Raymond Gourash, Steven Hammond, Nathan Heckathorn, David Hollon, Charles Huff, Gary Huff, Richard Huffman, Anthony King, Les Krotzer, Robert Kuhn, Gerald Lanning, David Laurence, William Legrant, Charles Lowery, Donald Mathias, Gregory Mayberry, Steven Mays, John McClellan, Danny McEowen, Stan Miller, James Munson, Vincent Napier, Robert Nye, Clayton Pitts, Dennis Powers, Eliseo Ramirez, John Rammel, James Reese, Leonard Risner, Patrick Roddy, Tom Saylor, John Schlosser, David Seibert, Marvin Shepherd, M.J. Shields,	:	Case No. 99-7401 Judge Katz Jury Demand Endorsed Hereon

Doug Sipe, David Spires, Larry Stark, Kenny Stevens, Michael Strahm, Anthony Stubbs, Russ Theil, Thomas Tucker, Charles Wagner, Harley Wagner, John Wagner, Gregory Walters, Robert Waltermyer, Charles Wood, Michael Woodruff, Allan Young, Kyle Young, Rick Young, Robert Baker, Dean Becker, Gary Salyer, Daryl Beaupre, Terry Gibbs, Jon Cottrell, Terry Biddle, John Birkmeier, Margaret Boyd, Guy Burrows, Russell Clewley, Thomas Clifton, Daniel Cline, Jed Couts, James Culp, Sandra Daniel, Michael Deal, Dana DeCamp, Richard Diltz, Steven Freed, Daniel Geething, Patric Goddard, Frank Guerrero, Alan Haunhurst, Robert Horning, Scott Hesse, Michael Hunsicker, Loren Hurless, Joanna Jacobs, Bobby Jordan, Bob Keiffer, Richard Kessler, Paul Kesner, Douglas Kraepel, Gary Lamberjack, David Luchini, Lester Lyons, Joella Marks, Jeffrey Martin, Kenneth McCaslin, Robert McDonald, Robert Millirans, Jeffrey Monroe, Joseph Myers, Steven Myers, John Nekoranec, Wayne Nestor, Paul Niese, Mike Nino, Ronald Perrine, Charles Radloff, Mark Rex, Michael Rigsby, Bruce Rose, Dennis Schimmoeller,	:	Case No. 99-7401 Judge Katz Jury Demand Endorsed Hereon

Michael Shultz, Sandy Snider, Larry Sutton, Cecil Turnbell, Ralph Wheeler, Robert White, Daniel Wilges, Robert Wilkins, Leonard Wilson, Richard Wright, Martin Zamudio, Emery Koszoru, Robert Beck, Donald Kime, David Pigga, Anthony Durkin, Richard Jackson, Thomas Kraycer, William Simson, Harry Baldan, Thomas Degrafenried, Leo Brunori, Delmar Weikel, Eugene Fisher, John Jerome, James Ferraro, Pete Borkowski, Kevin Parker, Michael Pisarski, Joseph Slakis, Boyd Smith, Vicent Cesari, Daniel Buranich, John Roszko, Gary Morcom, Stanley Homitz, Joseph Erzar, Dennis Kobierecki, John Wargo, Paul Debish, James Swartz, Peter Rosar, George Sansky, Partrick Rosemellia, Robert Clark, George Archibald, Thomas Earyes, Stanley Cominsky, JuLeann, Kurchin, James Clark, Keith Winkler, Ted Anaszeuski, John Manko, Ronald Kennedy,	:	Case No. 99-7401
and	:	Judge Katz
Thomas Babb, Roger Pool, Gary Rhodes, Ronald Mitchem, Jim Welly, David Dillon, Leonard Haaser, Ed Galan, David Puchta, Michael Lucius,	:	Jury Demand Endorsed Hereon

and	:	
Mario Diaz, Dennis Ryan, Michael Williams,	:	Case No. 99-7401
Plaintiffs,	:	Judge Katz
v.	:	Jury Demand Endorsed Hereon
GENERAL DYNAMICS LAND SYSTEMS, INC.,	:	
Defendant.	:	

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MONEY DAMAGES WITH JURY DEMAND ATTACHED

Plaintiffs, complaining of Defendant, alleges as follows:

PARTIES

1. Plaintiffs are citizens of the United States of America and are citizens and residents of the State of Ohio. Plaintiffs, Thomas Babb, Roger Pool, Gary Rhodes, Ronald Mitchem, Jim Welly, David Dillon, Leonard Haaser, Ed Galan, David Puchta and Michael Lucius, shall hereinafter be jointly and severally referred to as :"Plaintiff Babb group." Plaintiffs, Mario Diaz, Dennis Ryan and Michael Williams, shall hereinafter be jointly and severally referred to as "Plaintiff Diaz group." All remaining Plaintiffs shall hereinafter be jointly and severally referred to as "Plaintiff Cline group."

2. Defendant General Dynamics Land Systems, Inc.

is a corporation authorized and existing under the law of the State of Delaware with its principal place of business in Sterling Heights, Michigan.

JURISDICTION AND VENUE

3. This action arises under Section 7 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626, and Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), 42 U.S.C. § 2000e-5 and Ohio Revised Code Chapter 4112.

4. Jurisdiction over Counts 1 and 3 of this action is conferred on this Court by § 7 of the ADEA, 29 U.S.C. § 626 and 28 U.S.C. § 1331 because the action arises under the laws of the United States.

5. Jurisdiction under Count 2 of this action is founded upon pendent jurisdiction and diversity of citizenship under 28 U.S.C. § 1332 in that the action is between citizens of different states and the amount of controversy exceeds the sum of $75,000, exclusive of interests and costs.

6. Venue is properly laid in the Northern District of Ohio, Western Division, because Defendant is doing business in Allen County, Ohio, and the claims alleged herein arose in Allen County, Ohio.

FACTUAL ALLEGATIONS

7. Plaintiff Cline group are current employees of Defendant.

8. Plaintiff Babb group and Plaintiff Diaz group are

former employees of Defendant.

9. Plaintiffs are current or former members of the United Auto Workers Union (UAW).

10. At all time relevant and material herein, Plaintiffs were employees of Defendant within the meaning of the ADEA.

11. At all times relevant and material herein, Plaintiffs were employees of Defendant within the meaning of Ohio Revised Code Chapter 4112.

12. At all times relevant and material herein, Defendant was an employer within the meaning of the ADEA.

13. At all time relevant and material herein, Defendant was an employer within the meaning of Ohio Revised Code Chapter 4112.

14. Prior to July 1, 1997, Plaintiffs were subject to and affected by a Collective Bargaining Agreement (CBA1) between Defendant and the UAW.

15. During the duration of CBA1, the UAW and Defendant entered into a subsequent collective bargaining agreement (CBA2) which became effective upon the expiration of CBA1 on July 1, 1997.

16. CBA2 is currently in effect.

17. Plaintiffs are 40 years of age or older and were less the 50 years of age on July 1, 1997.

18. CBA2 imposed a limit on the level of benefits provided to Plaintiff on the basis of their age.

19. The CBA's restrictions resulted in a discriminatory impact on Plaintiffs.

20. Defendant's conduct resulted in a discriminatory impact on Plaintiffs.

21. As a result of the imposed limits on their benefits, Plaintiff Babb group retired from employment with Defendant prior to CBA2's effective date to preserve their benefits and prevent losing said benefits guaranteed under CBA1.

22. Plaintiff Diaz group retired from employment with Defendant after CBA2's effective date. Upon their retirement, Plaintiff Diaz group received less benefits than if they had retired under CBA1.

23. Plaintiff Cline group are currently employed by Defendant and subject to CBA2's limit on their level of retirement benefits on the basis of their age.

24. Plaintiff Dennis Cline initiated charges on behalf of Plaintiffs with the United Sates Equal Opportunity Employment Commission (EEOC), alleging that CBA2 discriminated against Plaintiffs on the basis of their age. The EEOC assigned these charges numbers 220971198 and 220971199.

25. On June 30, 1998, the EEOC issued a determination that CBA2 adversely affects Plaintiffs "by imposing a limitation on the level of benefits provided to them on the basis of their age." (See attached Exhibit 1).

COUNT 1: AGE DISCRIMINATION (ADEA)

26. Plaintiffs incorporate the preceding paragraphs.

27. Defendant's conduct constitutes a violation of the ADEA, including, but not limited to, violation of 29 U.S.C. §§ 206-207.

28. As a result of the foregoing unlawful conduct on the part of Defendant, each member of the Plaintiff Babb group suffered and continues to suffer lost wages and additional damages in excess of $75,000 exclusive of interest and costs.

29. As a result of the foregoing unlawful conduct on the part of Defendant, each member of the Plaintiff Diaz group suffered and will continue to suffer damages as a result of lost benefits in excess of $75,000 exclusive of interest and costs.

30. As a result of the foregoing unlawful conduct on the part of Defendant, each member of the Plaintiff Cline group suffered and will continue to suffer damages as a result of lost benefits in the amount to be determined at trial.

COUNT 2: AGE DISCRIMINATION (OHIO REVISED CODE CHAPTER 4112)

31. Plaintiff incorporate the preceding paragraphs.

32. Defendant's conduct constitutes a violation of Ohio Revised Code Section 4112.99.

33. As a result of the foregoing unlawful conduct on the part of Defendant, each member of the Plaintiff Babb group

suffered and continues to suffer lost wages and additional damages in excess of $75,000 exclusive of interest and costs.

34. As a result of the foregoing unlawful conduct on the part of Defendant, each member of the Plaintiff Diaz group suffered and will continue to suffer damages as a result of lost benefits in excess of $75,000 exclusive of interest and costs.

35. As a result of the foregoing unlawful conduct on the part of Defendant, each member of the Plaintiff Cline group suffered and will continue to suffer damages as a result of lost benefits in an amount to be determined at trial.

COUNT 3: DECLARATORY JUDGMENT

36. Plaintiffs incorporate the preceding paragraphs.

37. There exists a justiciable controversy between Plaintiffs and Defendant concerning Plaintiffs' rights and Defendant's responsibilities under CBA2.

38. Plaintiff Cline group has standing to bring this action against Defendant.

39. In the alternative, if this Court determines Plaintiff Cline group does not have standing to bring this action against Defendant at this time, this Court should determine if and when Plaintiff Cline group will have standing to bring this action against Defendant.

40. Plaintiff Cline group's claims in this action are ripe for determination by this Court.

41. In the alternative, if this Court determines Plaintiff

Cline group's claims in this action are not ripe for determination by this Court at this time, this Court should determine if and when Plaintiff Cline group's claims in this action will be ripe for determination by this Court.

WHEREFORE, Plaintiff demand that this Court:

1. Adjudge and declare the rights and responsibilities of the parties.

2. Declare and determine:

A. The CBA is in conflict with and violates Plaintiffs' rights as protected by and prescribed by federal and state law;

B. Plaintiffs have been damaged.

C. Plaintiffs are entitled to compensation for all back pay and benefits due as a result of Defendant's wrongful action.

D. Defendant willfully violated the federal and state law.

E. There has arisen among and between the parties a justiciable controversy concerning the rights and responsibilities of the parties under the CBA.

3. Award Plaintiff Babb group compensatory damages in excess of $75,000 exclusive of interest and costs.

4. Award Plaintiff Diaz group compensatory damages in excess of $75,000 exclusive of interest and costs.

5. Award Plaintiff Cline group compensatory damages in an amount to be determined at trial.

6. Issue preliminary and permanent injunctions precluding Defendant's continuation of Defendant's discriminatory conduct.

7. Grant such other and further relief to which Plaintiffs may be entitled against the Defendant in either law or equity including their costs and attorneys fees incurred herein.

JURY DEMAND

Plaintiffs hereby request a jury in this matter.

Respectfully submitted,

/s/ Mark W. Biggerman
Mark W. Biggerman
Ohio Supreme Court Number 0064092
GRANGER & BIGGERMAN CO., L.P.A.
132 Northwoods Boulevard
Columbus, Ohio 43235
(614) 854-0615
(614) 885-7574 (fax)
Trial Attorney for Plaintiffs

/s/ E. Bruce Hadden
E. Bruce Hadden
Ohio Supreme Court No. 0031753
HADDEN CO., L.P.A.
132 Northwoods Boulevard
Columbus, Ohio 43235
(614) 431-2000
(614) 436-4500 (fax)
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

A true a copy of the foregoing Amended Complaint was served on the parties listed below by regular mail on Monday, September 7, 1999.

/s/ Mark W. Biggerman
Mark W. Biggerman

Rolf H. Scheidel (0023954)
Shumaker, Loop & Kendrick, LLP
North Courthouse Square
1000 Jackson
Toledo, Ohio 43624-1573
Attorney for Defendant

Exhibit 1

U.S. Equal Employment Opportunity Commission
Cleveland District Office

Charge No.: 220971199

U.A.W. Local 2075
1440 Bellefontaine Avenue
Lima, Ohio 45804 Respondent

DETERMINATION

I issue the following findings with respect to the Respondent's compliance with the Age Discrimination in Employment Act of 1967 (ADEA), as amended. Respondent is a labor organization subject to the ADEA.

The Commission has completed an investigation of the Respondent to determine its compliance with the ADEA. In particular, the Commission investigated the Respondent's changes to the health benefits upon retirement.

Examination of the evidence establishes that Respondent's Collective Bargaining Agreement provides that employees who had not reached fifty years of age by July 1, 1997 would not be entitled to the same medical benefits upon retirement as those employees who attained fifty years of age by that same date. This provision adversely affects those employees in the protected age group between the ages of 40 through 49 by imposing a limitation on the level of benefits provided to them on the basis of their age. Based on the foregoing, I have determined that the evidence obtained during the investigation

establishes a violation of the ADEA.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the Respondent to join with it in reaching a just resolution of this matter. The confidentiality provisions and Commission Regulations apply to information obtained during conciliation.

Charge No.: 220970827

If the Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the office Director is not obtained, the Director will inform the Respondent and advise them of the court enforcement alternatives available to the Commission.

On Behalf of the Commission:

June 30, 1998 /s/ Dorothy J. Porter
Date Dorothy J. Porter
District Director

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

WILLIAM J. KILBERG
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

DONALD B. VERRILLI, JR.
Counsel of Record
DEANNE E. MAYNARD
JARED O. FREEDMAN
MARTINA E. VANDENBERG
JENNER & BLOCK, LLC
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

July 7, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Court of Appeals erred in holding, contrary to decisions of the First and Seventh Circuits, that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, prohibits "reverse discrimination," *i.e.*, employer actions, practices, or policies that treat older workers more favorably than younger workers who are at least forty years old.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were plaintiffs-appellants in the court below and are respondents in this Court: John Alge, David Bayes, Gary Bish, Dan Brenamen, Lewis Browning, Anthony Ciminillo, Scott Danner, Hixey Deeble, Robert Dewald, Larry Dicke, Richard Dirmeyer, David Driggs, Ron Duran, Kenneth Emahiser, Donald Eversole, Earl Fast, Dennis Ferguson, Robert Feucht, William Fisher, Steven Flake, Vada Flinders, Robert Frye, Gregory Gebolys, Joseph Gibson, Robert Greenlee, Raymond Gourash, Steven Hammond, Nathan Heckathorn, David Hollon, Charles Huff, Gary Huff, Richard Huffman, Anthony King, Les Krotzer, Robert Kuhn, Gerald Lanning, David Laurence, William Legrant, Charles Lowery, Donald Mathias, Gregory Mayberry, Steven Mays, John McClellan, Danny McEowen, Stan Miller, James Munson, Vincent Napier, Robert Nye, Clayton Pitts, Dennis Powers, Eliseo Ramierz, John Rammel, James Reese, Leonard Risner, Patrick Roddy, Tom Saylor, John Schlosser, David Seibert, Marvin Shepherd, M.J. Shields, Doug Sipe, David Spires, Larry Stark, Kenny Stevens, Michael Strahm, Anthony Stubbs, Russ Theil, Thomas Tucker, Charles Wagner, Harley Wagner, John Wagner, Gregory Walters, Robert Waltermyer, Charles Wood, Michael Woodruff, Allan Young, Kyle Young, Rick Young, Robert Baker, Dean Becker, Gary Salyer, Daryl Beaupre, Terry Gibbs, Jon Cottrell, Terry Biddle, John Birkmeier, Margaret Boyd, Guy Burrows, Russell Clewley, Thomas Clifton, Daniel Cline, Jed Couts, James Culp, Sandra Daniel, Michael Dean, Dana DeCamp, Richard Diltz, Steven Freed, Daniel Geething, Patrick Goddard, Frank Guerrero, Alan Haunhurst, Robert Horning, Scott Hesse, Michael Hunsicker, Loren Hurless, Joanna Jacobs, Bobby Jordan, Bob Keiffer, Richard Kessler, Paul Kesner, Douglas

Kraepel, Gary Lamberjack, David Luchini, Lester Lyons, Joella Marks, Jeffrey Martin, Kenneth McCaslin, Robert McDonald, Robert Millirans, Jeffrey Monroe, Joseph Myers, Steven Myers, John Nekoranec, Wayne Nestor, Paul Niese, Mike Nino, Ronald Perrine, Charles Radloff, Mark Rex, Michael Rigsby, Bruce Rose, Dennis Schimmoeller, Michael Schultz, Sandy Snider, Larry Sutton, Cecil Turnbell, Ralph Wheeler, Robert White, Daniel Wilges, Robert Wilkins, Leonard Wilson, Richard Wright, Martin Zamudio, Emery Koszoru, Robert Beck, Donald Kime, David Pigga, Anthony Durkin, Richard Jackson, Thomas Kraycer, William Simson, Harry Baldan, Thomas Degrafenried, Leo Brunori, Delmar Weikel, Eugene Fisher, John Jerome, James Ferraro, Pete Borkowski, Kevin Parker, Michael Pisarski, Joseph Slakis, Boyd Smith, Vincent Cesari, Daniel Buranich, John Roszko, Gary Morcom, Stanley Homitz, Joseph Erzar, Dennis Kobierecki, John Wargo, Paul Debish, James Swartz, Peter Rosar, George Sansky, Patrick Rosemellia, Robert Clark, George Archibald, Thomas Earyes, Stanley Cominsky, Juleann Kurchin, James Clark, Keith Winkler, Ted Anaszeuski, John Manko, Ronald Kennedy, Thomas Babb, Roger Pool, Gary Rhodes, Ronald Mitchem, Jim Welly, David Dillon, Leonard Haaser, Ed Galan, David Puchta, Michael Lucius, Mario Diaz, Dennis Ryan and Michael Williams.

RULE 29.6 STATEMENT

Petitioner is a subsidiary of General Dynamics Corporation, a publicly traded company. No corporation owns more than 10 percent of the stock of General Dynamics Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

A. Factual Background 5

B. Proceedings in the District Court 6

C. Proceedings in the Court of Appeals 7

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. THE ADEA DOES NOT PROHIBIT PREFERENTIAL TREATMENT FOR OLDER WORKERS. 13

A. The Statutory Text Does Not Authorize Workers Forty and Older to Complain That They Have Been Disfavored Because They Are Too Young. 14

1. The ADEA's Statement of Findings and Purpose Demonstrates That Section 4(a)(1) Prohibits Only Discrimination Against Older Workers and in Favor of Younger Workers. 18

2. The ADEA's Structure Further Demonstrates That Section 4(a)(1) Prohibits Only Discrimination Against Older Workers in Favor of Younger Workers. 23

B. The ADEA's Legislative History Confirms That Congress Intended to Prohibit Only Discrimination Based on Old Age. 25

C. This Court's Decision in *O'Connor v. Coin Caterers Corporation* Further Confirms That the ADEA Prohibits Only Discrimination Based on Old Age. 29

D. The Sixth Circuit's Interpretation of the ADEA Is Irreconcilable with Thirty-Five Years of Precedent. 31

E. Section 4(f)(2)(B)(i) of the ADEA Also Forecloses Respondents' Claims....35

F. The EEOC Guideline Cited by the Sixth Circuit Provides No Basis for Interpreting the ADEA to Prohibit Providing Older Workers with Benefits Not Available to Younger Workers....38

II. INTERPRETING THE ADEA TO AUTHORIZE SUITS BY YOUNGER WORKERS CHALLENGING PREFERENCES GIVEN TO OLDER WORKERS WOULD DEFEAT SETTLED EXPECTATIONS AND HAVE SEVERE PRACTICAL CONSEQUENCES. 40

CONCLUSION 46

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 21

Brooks v. City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996) 37

Brown v. Gardner, 513 U.S. 115 (1994) 14

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 40

Christensen v. Harris County, 529 U.S. 576 (2000) 39

Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544 (10th Cir. 1988) 35

Corbin v. Southland International Trucks, 25 F.3d 1545 (11th Cir. 1994) 35

Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S. Ct. 2041 (2003) 13, 32, 40

Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) 14

Deal v. United States, 508 U.S. 129 (1993) 10, 14, 44

Dittman v. General Motors Corp., 941 F. Supp. 284 (D. Conn. 1996), *aff'd*, 116 F.3d 465 (2d Cir. 1997) (unpublished table decision) 31

Dole v. United Steelworkers of America, 494 U.S. 26 (1990) 14, 20

EEOC v. Clay Printing Co., 955 F.2d 936 (4th Cir. 1992) 33

EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999) 45

Elrod v. Sears, Roebuck & Co., 939 F.2d 1466 (11th Cir. 1991) 34

Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239 (7th Cir. 1992) 33

Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988) 34

Garcia v. United States, 469 U.S. 70 (1984) 27, 28

Goetz v. Farm Credit Services, 927 F.2d 398 (8th Cir. 1991) 33

Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992) ..... *passim*

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 11, 19, 22

Hebert v. Mohawk Rubber Co., 872 F.2d 1104 (1st Cir. 1989) 33

Hiatt v. Union Pacific Railroad Co., 65 F.3d 838 (10th Cir. 1995) 24

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961) 14, 15, 19, 20

Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988) 22, 25, 42

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) 17, 21

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 14

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) 44

Kralman v. Illinois Department of Veterans' Affairs, 23 F.3d 150 (7th Cir. 1994) 35

LaPointe v. United Autoworkers Local 600, 8 F.3d 376 (6th Cir. 1993) 35

Lawrence v. Town of Irondequoit, 246 F. Supp. 2d 150 (W.D.N.Y. 2002) 31

Lowe v. Commack Union Free School District, 886 F.2d 1364 (2d Cir. 1989) 34

MCI Telecommunication Corp. v. American Telephone & Telegraph Co., 512 U.S. 218 (1994) 16, 17

Massachusetts v. Morash, 490 U.S. 107 (1989) 14, 22

Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985) 34

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 21

Mississippi Power and Light Co. v. Local Union Nos. 605 and 985, International Brotherhood of Electric Workers, 945 F. Supp. 980 (S.D. Miss. 1996), *aff'd*, 105 F.3d 551 (5th Cir. 1996) (unpublished table decision) 32

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 21

Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993) 35

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) ..... *passim*

O'Gilvie v. United States, 519 U.S. 79 (1996) 14

Parker v. Wakelin, 882 F. Supp. 1131 (D. Me. 1995) 31

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 14

Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001) 14

Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977) 35

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 24

Rannels v. Hargrove, 731 F. Supp. 1214 (E.D. Pa. 1990) 32

Regions Hospital v. Shalala, 522 U.S. 448 (1998) 14

Reno v. Koray, 515 U.S. 50 (1995) 14

Richmond, Fredericksburg & Potomac Railroad Co. v. Forst, 4 F.3d 244 (4th Cir. 1993) 37

Rinehart v. City of Independence, 35 F.3d 1263 (8th Cir. 1994) 35

Rowland v. California Men's Colony, 506 U.S. 194 (1993) 24

Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988) 31

Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000) 34

Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995) 32

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 20

Thornbrough v. Columbus & Greenville Railroad Co., 760 F.2d 633 (5th Cir. 1985) 33

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) 20

United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) 14

United States v. Carolene Products Co., 304 U.S. 144 (1938) 21

United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113 (1850) 15

United States v. Mead, 533 U.S. 218 (2001) 39

United States v. Morton, 467 U.S. 822 (1984) 14, 18

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 23, 24

Wehrly v. American Motors Sales Corp., 678 F. Supp. 1366 (N.D. Ind. 1988) 31

STATUTES & REGULATIONS

26 U.S.C. § 72(t)(2)(A)(i) 43

26 U.S.C. § 401(a)(28)(B)(iii) 43

28 U.S.C. § 1254(l) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

29 U.S.C. § 621 ..... 3, 9, 11, 13

29 U.S.C. § 621(a) 27

29 U.S.C. § 621(a)(1) 4, 13, 18

29 U.S.C. § 621(a)(2) 4, 18

29 U.S.C. § 621(a)(3) 4, 18

29 U.S.C. § 621(b) 18, 27, 42, 44

29 U.S.C. § 623(a) 3

29 U.S.C. § 623(a)(1) ..... *passim*

29 U.S.C. § 623(f)(2) ..... *passim*

29 U.S.C. § 623(j) 24

29 U.S.C. § 623(l) 24

29 U.S.C. § 631(a) 3, 11, 23, 30

29 C.F.R. § 1625 39

29 C.F.R. § 1625.2(a) 12, 38, 39

29 C.F.R. § 1625.2(b) 39

29 C.F.R. § 1625.10(b) 37

29 C.F.R. § 1625.10(d) 37

LEGISLATIVE MATERIALS

Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 90th Cong. (1967) 27

Age Discrimination in Employment: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor, 90th Cong. (1967) 27

Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision, Joint Hearing before the Select House Comm. on Aging and the Subcomm. on Employment Opportunities and Labor-Management Relations of the Comm. on Education and Labor, 101st Cong. (Sept. 21, 1989) 28

Older Workers Benefit Protection Act: Joint Hearing before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Special Comm. on Aging, 101st Cong. (Sept. 27, 1989) 29

Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (1965) 25, 26

Special Message to the Congress Proposing Programs for Older Americans, 1 Pub. Papers 32 (1967) 26

S. Rep. No. 90-723 (1967) 27

H.R. Rep. No. 90-805 (1967) 27

Cong. Rec. S15896 (Nov. 6, 1967) 28

46 Fed. Reg. 47724 (Sept. 29, 1981) 39

MISCELLANEOUS

American Heritage College Dictionary (3d ed. 1993) 16

American Heritage Dictionary of the English Language (4th ed. 2000) 16

The Compact Oxford English Dictionary (2d ed. 1999) 16

The Current State of Retiree Health Benefits: Findings From the Kaiser/Hewitt 2002 Retiree Health Survey (Dec. 2002), available at http://www.kff.org/content/2002/20021205a/ 41

Encarta World English Dictionary (1999) 16

Paul Fronstein & Dallas Salisbury, *Retiree Health Benefits: Savings Needed to Fund Health Care in Retirement, Employee Benefit Research Institute*, Issue Brief No. 254 (Feb. 2003), available at http://www.ebri.org/pdfs/0203ib.pdf 41

The New Lexicon Webster's Dictionary of the English Language (1987) 16

Random House Unabridged Dictionary (2d ed. 1993) 16

Random House Webster's College Dictionary (2d rev. ed. 2000) 16

The Random House Dictionary of the English Language (1967) 17

William Shakespeare, *King Lear*, act 1, sc. 1 16

Webster's Third New International Dictionary (1993) 16

Webster's Third New International Dictionary (1961) 17

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, reported at 296 F.3d 466 (6th Cir. 2002), is reprinted at Pet. App. 1a-20a. The decision of the United States District Court for the Northern District of Ohio granting petitioner's motion to dismiss, reported at 98 F. Supp. 2d 846 (N.D. Ohio 2000), is reprinted at Pet. App. 21a-25a. The order of the United States Court of Appeals for the Sixth Circuit, denying rehearing *en banc*, is set forth at Pet. App. 26a-27a.

JURISDICTION

The district court had federal question jurisdiction over the respondents' claims under the Age Discrimination in Employment Act of 1967 ("ADEA" or "the Act") pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on July 22, 2002. Petitioner filed a timely petition for rehearing, which the court of appeals denied on September 19, 2002. Pet. App. 26a-27a. On December 6, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 17, 2003. *See* Application No. 02A468. The petition for a writ of certiorari was filed on January 16, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

The ADEA's statement of findings and purpose, § 2 of the Act, provides in pertinent part:

> (a) The Congress hereby finds and declares that –
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . .
>
> * * *
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621.

The ADEA's nondiscrimination provision, § 4(a) of the Act, provides in pertinent part:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

29 U.S.C. § 623(a).

The ADEA's age limitation, § 12(a) of the Act, provides:

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

29 U.S.C. § 631(a).

STATEMENT OF THE CASE

Congress enacted the ADEA to protect "older workers" against arbitrary discrimination arising out of invalid stereotypes about the impact of aging on workplace performance. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3). The Act combats the discriminatory effect of such stereotypical views, which Congress deemed responsible for the fact that unemployment was, "*relative to the younger* ages, high among *older workers.*" *Id.* § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphasis added).

In the decision below, a badly fractured Sixth Circuit panel held that the ADEA forbids employers from treating older employees more favorably than their younger co-workers, as long as the younger co-workers are forty or older. That decision cannot be squared with the Act's language, structure, and express purpose, all of which compel the conclusion that the Act protects against discrimination because one is too old, not because one is too young. That conclusion also is supported by the Act's legislative history, this Court's decisions, and over thirty-five years of federal court ADEA jurisprudence. Moreover, allowing youth discrimination claims would impose serious and unwarranted new burdens, both on the older workers whose opportunities the Act was intended to secure and on the employers who seek to extend those opportunities without subjecting themselves to vexatious litigation.

A. Factual Background

General Dynamics Land Systems, Inc. ("General Dynamics") operates manufacturing plants at Lima, Ohio and Scranton, Pennsylvania, at which the employees are represented by the United Auto Workers ("UAW"). This litigation arises from two collective bargaining agreements negotiated between General Dynamics and UAW. The agreement in force until mid-1997 ("CBA1") provided full health benefits to all employees who retired with thirty years' seniority. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement ("CBA2"), which ended the practice of providing health benefits to all retirees effective July 1, 1997. Instead, CBA2 offered retiree health benefits only to those employees who were at least fifty years old as of July 1, 1997. Pet. App. 3a.

Respondents are present and former employees of General Dynamics who were at least forty but not yet fifty years old on July 1, 1997. *Id.* The respondents are therefore protected by the prohibitions of the ADEA, which apply only to workers over forty. ADEA § 12(a), 29 U.S.C. § 631(a). Each of the respondents had qualified or could have potentially qualified for retiree health benefits under CBA1, but was ineligible for such benefits under CBA2. Pet. App. 3a.

On June 30, 1998, the EEOC wrote General Dynamics a letter opining that CBA2 "adversely affects those employees in the protected age group between the ages of forty through forty-nine by imposing a limitation on the level of benefits provided to them on the basis of their age" because they "would not be entitled to the same medical

benefits upon retirement as those employees who attained fifty years of age by that same date." JA16. Although the EEOC letter suggested that the EEOC might file suit if it could not reach an acceptable conciliation with General Dynamics, *id.*, the EEOC never filed suit.

B. Proceedings in the District Court

Respondents filed a putative class action against General Dynamics in the United States District Court for the Northern District of Ohio. Pet. App. 2a-3a, 21a. The complaint alleged that CBA2's limitation of retiree health benefits to employees fifty and older amounted to age discrimination, and they sought damages under the ADEA and state law. *Id.* at 22a.

The district court granted General Dynamics' motion to dismiss. *Id.* at 21a-25a. The court recognized that General Dynamics and the union lawfully could have "agree[d] to abrogate the retiree health insurance benefits program for all current employees in CBA2." *Id.* at 24a. The question, therefore, was whether the ADEA precluded General Dynamics from nevertheless being more generous to its oldest workers – those over fifty – if it did not provide the same benefit to younger workers who were at least forty. *Id.* The court rejected the notion that respondents could bring suit under the ADEA because they were too *young* to receive health benefits under CBA2. In doing so, the district court joined "[e]very federal court to have addressed the issue." *Id.*

C. Proceedings in the Court of Appeals

Respondents appealed, and the Sixth Circuit reversed in three separate opinions. Pet. App. 1a-20a. Relying on the purported "plain" language of the statute, Judge Ryan's opinion concluded that the only possible construction of the ADEA's operative provision, § 4(a)(1), bars basing employment decisions on the specific number of years a worker has lived, as long as the affected worker is older than forty. *Id.* at 6a-7a. The decision rested on the following "syllogism": because respondents were over forty and thus within "the protected class" of the ADEA, and because CBA2 defines eligibility for retiree benefits based on the specific number of years a worker has lived, respondents stated a claim under the ADEA. *Id.* at 11a.

Judge Ryan's opinion, while recognizing that respondents' claims were "unusual" in that "the plaintiffs were younger than the employees who were to receive health benefits upon retirement," Pet. App. 10a, did not analyze the ADEA's overall structure and purposes in concluding that the Act authorized such claims. Instead, the opinion dismissed as "hortatory, generalized language" the specific congressional findings and declarations of policy contained in § 2 of the ADEA, which make clear that Congress enacted the ADEA to prohibit discrimination against "*older* workers." *See id.* at 7a-9a. The opinion acknowledged that its conclusions ran contrary to decisions of the First and Seventh Circuits, *id.* at 6a-7a (citing *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.); *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992)), and "the majority of courts to consider the question,"

but did "not find the reasoning undergirding these opinions persuasive." *Id.*

Judge Ryan's opinion repeatedly stated that it was relying entirely on the "plain" language of § 4(a)(1), which it declared was controlling over any more general provisions such as the congressional findings and purpose set forth in § 2. The opinion also noted that the Equal Employment Opportunity Commission ("EEOC") had promulgated a regulation which Judge Ryan believed had interpreted the ADEA to prohibit discrimination against relatively younger workers, as long as they were forty or over. *Id.* at 10a (citing 29 C.F.R. § 1625.2(a)).

Judge Cole wrote separately to state his concurrence with Judge Ryan's opinion, and to note his discomfort with the "counterintuitive" result reached by the majority and his "serious doubts" that the majority's holding accorded with Congress's intent in enacting the ADEA. Pet. App. 18a, 12a. Judge Cole also conceded that the majority's decision was in "tension" with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which held that a *prima facie* case of age discrimination under the Act includes a showing that the challenged employer action favored a person "substantially younger" than the plaintiff. Pet. App. at 16a-17a (citing *O'Connor*, 517 U.S. at 313).

Judge Williams dissented. Pet. App. 18a-20a. Noting that the panel majority stood alone in its construction of the Act to permit reverse discrimination suits, he concluded that "'the ADEA does not protect the young as well as the old, or even, we think, the younger *against* the

older.'" *Id.* at 18a-19a (quoting *Hamilton*, 966 F.2d at 1227) (quotation marks and citation omitted). He reasoned, as did the Seventh Circuit, that "age discrimination cannot be reversed as can sex or race discrimination because '[a]ge is not a distinction that arises at birth. Nor is age immutable.'" *Id.* at 19a (quoting *Hamilton*, 966 F.2d at 1227) (alteration in original). Although Judge Williams thought there might be "room for argument" over the meaning of § 4(a)(1) considered in isolation, he stated that such ambiguity could and should be resolved by referring to the statement of findings and purpose in § 2 of the ADEA, 29 U.S.C. § 621. *Id.* That provision's repeated references to "older workers" and "older persons," he wrote, make clear "Congress's intent to prohibit employers from discriminating against older workers, as opposed to younger ones." *Id.*

Judge Williams also pointed out that the majority's decision threatened to upset the benefits based on chronological age in early retirement programs that collective bargaining agreements across the country have established, in recognition of the fact that "a 50-year-old worker may need more protection or more benefits than a 40-year-old worker." *Id.* The inevitable result of the majority's contravention of this "common sense understanding" of benefits negotiation, he warned, would be that "bargaining for all workers, regardless of age, [will] suffer." *Id.*

SUMMARY OF ARGUMENT

The ADEA protects individuals from being discriminated against because they are too old, not because they are too young. The statute's operative language prohibits employment discrimination against an individual "because of such individual's age." ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). That text indisputably protects workers from adverse treatment based on their advanced age. But it cannot reasonably be read to extend to claims by younger workers that they have been denied employment benefits given to persons older than they are.

The Sixth Circuit committed a fundamental error in holding that the "plain language" of § 4(a)(1) authorizes workers forty or older to complain that they have been disfavored because they are too young. Even considered in isolation, the word "age" in § 4(a)(1) is plainly susceptible of the meaning "advanced years" or "old age," rather than "chronological age." Indeed, that is a common dictionary definition of the word "age." If "age" in § 4(a)(1) means "old age" rather than "chronological age," then the ADEA does not authorize "youth discrimination" claims of the kind at issue here. Thus, the "plain language" of § 4(a)(1) does not support the Sixth Circuit's reading of the ADEA.

To the contrary, when read in the context of the ADEA's other provisions, the prohibition of discrimination "because of . . . age" in § 4(a)(1) must be read to forbid only discrimination based on old age. *See Deal v. United States*, 508 U.S. 129, 131-32 (1993). That is the only fair reading of the statutory text taken as a whole and the only reading that makes sense as a practical matter. The ADEA's express

statement of findings and purpose, set forth in § 2 of the Act, 29 U.S.C. § 621, focuses exclusively on the disadvantages older employees face in the workplace relative to younger employees, and confirms that Congress's exclusive concern was eliminating the "inaccurate and stigmatizing stereotypes" of older workers as less productive and competent than their younger counterparts. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993). In light of Congress's express statement of findings and purpose in § 2, allowing "youth discrimination" claims of the kind endorsed by the Sixth Circuit would be a pointless and wholly unwarranted expansion of the ADEA's scope. The Sixth Circuit's approach would severely curtail employers' freedom of action and subject them to massive potential liability for a wide range of socially positive employment decisions that have never been thought controversial, while denying employees the right to bargain collectively for sensible benefit plans of the kind at issue here.

The remainder of the ADEA's structure similarly confirms that § 4(a)(1) prohibits only discrimination based on old age. Most importantly, only persons forty or older can claim the protections of the ADEA. ADEA § 12(a), 29 U.S.C. § 631(a). Had Congress intended to prohibit discrimination on the ground that an employee is too young as well as on the ground that the employee is too old, it would make no sense to limit the class of persons eligible to make such claims to those forty or older. Reinforcing the clear meaning of the statute's text and structure, the ADEA's legislative history also attests to the fact that Congress's sole concern in enacting the ADEA was protecting those forty and older from discrimination on the basis of unfair assumptions that they cannot perform as well as

comparatively younger workers. That is also the only reading consistent with this Court's precedent, *see O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), as well as decades of lower court precedent interpreting and applying the ADEA in a variety of contexts.

The EEOC interpretive guideline cited in Judge Ryan's opinion does not support a contrary result. *See* Pet. App. 10a (citing 29 C.F.R. § 1625.2(a)). On its face, that provision – which the EEOC has never enforced judicially – simply states the same rule this Court definitively established in *O'Connor*, *i.e.*, that an older worker can establish a prima facie case of discrimination even if replaced by a another worker within the protected class of those forty or older, so long as the younger worker is substantially younger. To the extent the EEOC intends the guideline to extend further and apply here, it should be rejected as fundamentally inconsistent with the text, structure and purposes of the ADEA, and patently unreasonable.

The Sixth Circuit's reading of the ADEA should also be rejected because it will generate serious real-world harms. The retiree health plan offered by General Dynamics in this case is identical in structure to hundreds of such plans that employers routinely offer. Declaring such plans to be presumptively unlawful would generate massive disruption, and would have the perverse consequence of prohibiting employers from offering such benefits to anyone, because employers simply cannot afford to offer them to all employees forty or older. The Sixth Circuit's reading would also subject employers to massive potential liability, as every employment decision could be attacked not only by workers claiming they were disfavored because they were too old but

also by workers forty or older claiming they were disfavored because they were too young.

Under remarkably similar circumstances, this Court recently rejected an interpretation of the Lanham Act that "would not only stretch the text, but . . . would be out of accord with the history and purpose of the [statute] and inconsistent with precedent" and would generate "serious practical problems." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2047, 2049 (2003). This Court should reject the Sixth Circuit's interpretation of the ADEA for the same reasons.

ARGUMENT

I. THE ADEA DOES NOT PROHIBIT PREFERENTIAL TREATMENT FOR OLDER WORKERS.

The ADEA bars only discrimination based on old age. When considered in light of Congress's express statement of findings and purpose in § 2 of the Act, 29 U.S.C. § 621, as well as the Act's overall structure, that is the only meaning that can reasonably be ascribed to the Act's prohibition of employment discrimination "because of . . . age." The legislative history likewise shows that Congress's sole concern in enacting the ADEA was preventing discrimination against individuals forty and older on the ground that an individual is too old. That is also the only reading of § 4(a)(1) that is consistent with this Court's decisions, as well as lower court precedent. The Sixth Circuit's contrary reading should thus be rejected.

A. The Statutory Text Does Not Authorize Workers Forty and Older to Complain That They Have Been Disfavored Because They Are Too Young.

As this Court has said many times, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal*, 508 U.S. at 132. The meaning of a word or phrase in a statute is not a matter of "definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). It is a "cardinal rule" that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citation omitted). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation omitted). *Accord Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001); *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n.5 (1998); *O'Gilvie v. United States*, 519 U.S. 79, 82-89 (1996); *Reno v. Koray*, 515 U.S. 50, 56 (1995); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987); *United States v. Morton*, 467 U.S. 822, 828 (1984); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08

(1961); *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850).

Although the Sixth Circuit paid lip service to these principles, it failed to apply them faithfully. Reading § 4(a)(1) in isolation, Judge Ryan's opinion concluded that the provision "clearly and unambiguously" forbade employers from favoring older workers over younger workers within what the opinion described as the "protected class." Pet. App. 6a. Focusing exclusively on the particular language in § 4(a)(1) extending the ADEA's coverage to "any individual" forty or older, Judge Ryan concluded that Congress's decision to protect "any individual" within that group necessarily meant that § 4(a)(1) protected such individuals from being treated less favorably on the basis of their relatively younger age as well as their relatively older age. *Id.* 6a-7a.[1] In his decisive concurrence, Judge Cole acknowledged "serious doubts," based on the overall "text and structure of the ADEA," that Congress intended to "allow persons ages forty and over to recover for so-called reverse age discrimination," but nevertheless agreed with Judge Ryan that the text of § 4(a)(1), standing alone,

---

[1] As a matter of textual analysis, that reading is incorrect. It does not follow that Congress, by protecting "any individual" forty or older from discrimination "because of such individual's age," necessarily protected such individuals from being treated less favorably because they are too young. The text is plainly susceptible of being read as protecting "any individual" forty or older from being treated less favorably only on the ground that the individual is too old. That reading gives full effect to the statutory language because *every* individual forty or older receives the protection, and every individual forty or older is potentially at risk of being disfavored because of being too old. Indeed, as will be shown, that is the natural meaning of the statutory language and the meaning compelled by the ADEA read as a whole.

necessarily "prohibits age discrimination that favors older over younger protected employees." Pet. App. 12a.

In reaching this conclusion, the opinions of Judges Ryan and Cole erroneously assumed without analysis that, as used in the phrase "because of . . . age" in § 4(a)(1), the word "age" necessarily means "the number of years a person has been alive." To be sure, the word "age" considered in isolation could mean chronological age. But the term "age" can also mean the "quality or state of being old."[2] Indeed, that is a standard dictionary definition of the word. *See Webster's Third New International Dictionary* 40 (1993); *Random House Unabridged Dictionary* 37 (2d ed. 1993) ("advanced years; old age"); *American Heritage Dictionary of the English Language* 32 (4th ed. 2000) ("[t]he state of being old; old age"); *The Compact Oxford English Dictionary* 28 (2d ed. 1999) ("[t]he latter part of life, when the physical effects of protracted existence become apparent; old age"); *The New Lexicon Webster's Dictionary of the English Language* 15 (1987) ("old age"); *Encarta World English Dictionary* 29 (1999) ("[b]eing old . . . the state of being advanced in years").[3] *See also MCI Telecomm. Corp.*

[2] "Age" has many other possible meanings. For example, "age" can mean "era" (as in the Age of Reason) or a stage in life (as in Shakespeare's "seven ages of man"). *See also* William Shakespeare, *King Lear*, act 1, sc. 1 (using "age" to mean "old age") ("Know that we have divided/In three our Kingdom: and it is our fast intent/To shake all cares and business from our age; Conferring them on younger strengths, while we/Unburthen'd crawl toward death.").

[3] *See also American Heritage College Dictionary* 25 (3d ed. 1993) ("[t]he state of being old; old age"); *Random House Webster's College Dictionary* 24 (2d rev. ed. 2000) ("advanced years; old age").

v. American Tel. & Tel. Co., 512 U.S. 218, 225-26 (1994) (relying on several of these dictionaries).[4]

The Sixth Circuit ignored this common understanding of the term "age," and therefore failed to recognize that the text of § 4(a)(1) can naturally be read as forbidding only discrimination based on old age or advanced years, rather than chronological age. The Sixth Circuit's "plain language" rendering of § 4(a)(1) is thus insupportable even on its own inappropriately constricted terms.

Equally to the point, when the ADEA's prohibition of discrimination "because of . . . age" is read as this Court has stressed it must be read – in context – the meaning that must be given to the statutory text is one that bars discrimination based only on "old age" or "advanced years." As will be shown, the ADEA's express statement of findings and purpose, as well as its overall structure, confirm in the clearest terms that § 4(a)(1) bars discrimination against those forty or older on the ground that they are too old, and not that they are too young. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) (describing "[o]ld age" as the characteristic protected by the ADEA from discrimination).

[4] Such definitions of "age" were common at the time Congress passed the ADEA in 1967, "the most relevant time for determining a statutory term's meaning." *MCI*, 512 U.S. at 228. *See Webster's Third New International Dictionary* 40 (1961) ("an advanced stage of life, . . . the quality or state of being old"); *The Random House Dictionary of the English Language* 27 (1967) ("advanced years; old age").

1. The ADEA's Statement of Findings and Purpose Demonstrates That Section 4(a)(1) Prohibits Only Discrimination Against Older Workers and in Favor of Younger Workers.

Section 2 of the ADEA sets forth Congress's findings that "*older* workers find themselves disadvantaged in their efforts to retain employment," that "arbitrary age limits . . . may work to the disadvantage of *older* persons," and that "the incidence of unemployment . . . is, relative to the younger ages, high among *older* workers." 29 U.S.C. § 621(a)(1), (2) & (3) (emphasis added). None of these findings evinces the slightest concern for the purported disadvantages that workers who are forty and over face because they are *younger* than other workers.

In light of these findings, Congress declared that the "purpose" of the ADEA is to protect older workers from discrimination and to find ways to address problems that arise as workers get older:

> It is therefore the purpose of this chapter to promote employment of *older* persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

ADEA § 2(b), 29 U.S.C. § 621(b) (emphasis added). *See generally Morton*, 467 U.S. at 833 (stressing significance of

"underlying purpose" in ascertaining plain meaning of statutory term).

The problems identified in § 2 of the ADEA are hardships faced only by older workers as compared to younger workers. These problems relate to misperceptions that younger people perform more effectively in the workplace than do older people. As this Court has previously explained, Congress promulgated the ADEA because of "its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes" that are "unsupported by objective facts." *Hazen Paper*, 507 U.S. at 610-11. In reality, "'the performance of older workers was at least as good as that of younger workers.'" *Id.* (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)). Indeed, "[i]t is *the very essence of age discrimination* for an older employee to be fired because the employer believes that productivity and competence decline with *old age*." *Id.* at 610 (emphasis added).

Thus, the Sixth Circuit's reading of the ADEA would do nothing to advance the goals that Congress itself identified in the ADEA. What the Sixth Circuit's approach would do is work a fundamental change in the ADEA by endorsing an entirely new (and potentially massive) class of "youth discrimination" claims that Congress cannot reasonably be interpreted to have intended. Indeed, the Sixth Circuit's approach would unleash this sweeping new remedial scheme to remedy a "problem" that does not exist, and would disable employers from granting and (employees from seeking through collective bargaining) entirely sensible benefit plans of the kind at issue in this case. *See Jarecki*,

367 U.S. at 307 (rejecting construction that would give "unintended breadth" to statute).

The Sixth Circuit majority dismissed the findings and purpose set forth in § 2 of the ADEA as "hortatory, generalized language," and invoked the maxim that "the more direct and specific language of a statute ordinarily trumps the more generalized." Pet. App. 7a. This Court has, however, repeatedly made clear that when Congress chooses to include statements of findings and purposes in a statute itself, such statements "give[] content" to the Act's terms, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999), and provide "[p]articularly useful" interpretive guidance, *Dole*, 494 U.S. at 936. *See also Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-98 (2002). The Sixth Circuit thus had it backwards in concluding that it could ignore the statement of findings and purpose set forth in § 2 of the ADEA, on the ground that the "plain language" of § 4(a)(1) dictated a different result. Section 2 provides particularly persuasive guidance as to what discrimination "because of . . . age" means in § 4(a)(1), and makes crystal clear that Congress intended to prohibit only discrimination based on old age.[5]

As is evident from the congressional findings, the ADEA's prohibition on discrimination "because of . . . age" addresses a different kind of problem, and operates in a

[5] In an analogous context, this Court relied on the statement of findings and purpose contained in the Americans With Disabilities Act in refusing to define "disability" so broadly that it would cover millions more people than the statutory findings and purposes indicated Congress intended. *See Toyota Motor Mfg.*, 534 U.S. at 197-98; *see also Sutton*, 527 U.S. at 484-87.

different manner, than does Title VII, which prohibits employment discrimination against any individual because of race or gender. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976). The races and the sexes are equal under our Constitution, and decisions based on the immutable characteristics of race or sex are inherently suspect. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying heightened scrutiny to government race-based decisions under the Equal Protection Clause); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (applying heightened scrutiny to government gender-based decisions). Title VII therefore makes presumptively unlawful any adverse employment decision based on race or gender, irrespective of the race or gender of the person harmed or benefited. *See Santa Fe*, 427 U.S. at 280 ("uncontradicted legislative history" shows that Title VII was intended to prohibit discrimination against all races and both genders).

In contrast, the ADEA seeks to eradicate discrimination based on stereotypes about being too old, rather than discrimination based on an inherently suspect classification. *Kimel*, 528 U.S. at 83 (holding that government age-based decisions receive only rational basis scrutiny and "[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life span, will experience it"). The ADEA's statement of findings and purpose contains no suggestion that Congress believed that an employee's chronological age was an inherently suspect criterion, and that employers should therefore be forbidden from considering it once an employee is forty years old. Nor would Congress have had

any reason for drawing such a conclusion. An employee does not generally encounter employment problems simply because the employee is over forty and relatively younger than other relatively older employees. It is an employee's *old* age that leads to inaccurate stereotypes and discrimination. *Hazen Paper Co.*, 507 U.S. at 610. As the Seventh Circuit has noted, "Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young, like the non-handicapped, cannot argue that they are similarly victimized." *Hamilton*, 966 F.2d at 1228; *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988) ("[T]he Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger *against* the older."). In short, there is "nothing to suggest that Congress believed age to be the equal of youth." *Hamilton*, 966 F.2d at 1227.

There are, moreover, many good reasons why employers or society generally might provide preferences to older workers. *See* Point II *infra*. An employer's decision to grant preferential treatment to an older worker on the basis of his advanced age thus "presents none of the risks that [the ADEA] is intended to address," and cannot be a basis for imposing liability under § 4(a)(1). *Morash*, 490 U.S. at 115.[6]

[6] Moreover, unlike the word "age" which can reasonably be read to mean "advanced years," no reasonable reading of "race" as used in Title VII could limit it to one particular majority or minority group, just as no reasonable reading of "sex" could limit it only to men or women.

2. The ADEA's Structure Further Demonstrates That Section 4(a)(1) Prohibits Only Discrimination Against Older Workers in Favor of Younger Workers.

The statutory structure provides further confirmation that § 4(a)(1) prohibits only discrimination based on old age.

Most strikingly, Congress's decision to limit the ADEA's protections to those forty or older, ADEA § 12(a), 29 U.S.C. § 631(a), refutes the notion that § 4(a)(1) authorizes employees to complain that they were disfavored because they were too young. As the Seventh Circuit has observed, if the ADEA were truly meant to prevent discrimination against workers based on their youth, "limiting the protected class to those 40 and above would make little sense." *Hamilton*, 966 F.2d at 1227.

Had Congress discerned a pattern of "inaccurate and stigmatizing stereotypes" about the relative inadequacies of younger rather than older workers, it could hardly have understood such a pattern to become evident only at age forty, and it would have had no reason to draw a line at age forty. The facts of this case illustrate why: under respondents' reading, a forty year old worker could challenge the benefit plan at issue here, but a thirty-nine year old worker could not, even though the thirty-nine year old is suffering exactly the same discrimination based on relative youth as the forty year old. The ADEA should not be interpreted to bring about this absurd result, particularly where (as here) the natural meaning of the text points in the opposite direction. *See United States v. X-Citement Video,*

Inc., 513 U.S. 64, 69 (1994); *Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993).

The defenses provided for in the ADEA (both as originally enacted and as amended over the years) reinforce the conclusion that § 4(a)(1) prohibits only discrimination based on old age. Section 4(f)(2) allows employers to treat older workers less favorably in order to comply with the terms of a bona fide seniority system. *See, e.g., Hiatt v. Union Pac. R.R. Co.*, 65 F.3d 838, 841 (10th Cir. 1995). Other provisions likewise protect employers from claims by *older* workers, carving out exceptions that expressly allow older workers to be disfavored. For example, the provision governing the employment of firefighters and law enforcement officers is a safe harbor that permits employers to hire only workers who are below a certain age and to require workers who attain a certain age to retire. *See* ADEA § 4(j), 29 U.S.C. § 623(j). Section § 4(f)(2)(B)(i), adopted in the wake of this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), authorizes employers to provide lower benefit levels to older workers than to younger workers so long as the employer is spending at least as much on the older workers' benefits as the employer spends on benefits for younger workers. 29 U.S.C. § 623(f)(2)(B)(i). Similarly, the minimum age exception in § 4(l)(1)(A) – which was also adopted in the wake of *Betts* – clarifies that a pension benefit plan providing for the attainment of a minimum age as a condition of eligibility for normal or early retirement does not presumptively discriminate against older workers.[7]

[7] This provision responded to pre-*Betts* case law indicating that early retirement plans could be challenged as presumptively discriminatory against older workers on the ground that such plans necessarily coerced workers into retiring before they were ready or were a sign that employees above the designated retirement age were not welcome. *See generally Karlen*, 837 F.2d at 317 (stating that an older worker may "fear[] he will be discriminated against on account of his age if he does not [take early retirement]," or may "refuse[] to take early retirement" and then be "discriminated against on account of his age").

None of these provisions even remotely suggests that Congress contemplated "youth discrimination" suits of the kind at issue here.

Thus, when § 4(a)(1)'s prohibition of discrimination "because of . . . age" is considered in its proper context, the only reasonable meaning that can be ascribed to the statute is that it protects individuals forty and older from being discriminated against only on the ground that they are too old, and not that they are too young. This Court therefore need look no further than the text and structure of the ADEA to reverse the decision below.

B. The ADEA'S Legislative History Confirms That Congress Intended to Prohibit Only Discrimination Based on Old Age.

Legislative history confirms what the ADEA's text and structure make plain: § 4(a)(1) does not entitle an employee forty or older to sue where older employees receive more favorable benefits.

The ADEA had its origins in a Labor Department report, commissioned by Congress, that concluded that older workers faced significant employment disadvantages because of discrimination in the job market. *Report of the Secretary of Labor, The Older American Worker: Age*

Discrimination in Employment (1965). The report listed multiple forms of "Discrimination in Employment Because of Age," including explicit maximum age limits in hiring, employer perceptions about the health and abilities of older workers, obsolescence of job skills, employers' preference for promoting from within (thereby limiting outside hiring to low-level positions), and higher pension costs. *Id.* at 5-17. All of these forms of discrimination disfavor workers for being too old, not too young.

Similarly, the administration's message accompanying its proposed legislation focused on the plight of older workers, including involuntary retirement caused by half of all jobs being "barred to applicants over 55," and a quarter being "closed to applicants over 45." *Special Message to the Congress Proposing Programs for Older Americans*, 1 Pub. Papers 32, 37 (1967). At no point did the administration express concern about discrimination against workers who were forty and over based on the relative youth of those workers. To the contrary, the Labor Department's report commended employers who had an "active policy of recruiting older persons," noting that such employers "praised them for performance and dependability." *Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment* 9 (1965).

This exclusive focus on protecting older workers is also evident throughout every hearing and floor debate during the bill's consideration. Committees of both houses heard extensive testimony relating to the hardships that being old places on older Americans and the factors interfering with their full participation in the workforce. The concern throughout those hearings related to the same factors set

forth in the Secretary of Labor's report: maximum age limits for hiring, involuntary retirement ages, and employers' preconceptions about the effectiveness of older workers. *See, e.g., Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong. 36-39, 85, 111, 146, 171 (1967); *Age Discrimination in Employment: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong. 6-9, 49, 56, 61 (1967). The committees in large part replicated the Labor Department's findings, which were ultimately incorporated into the ADEA's "Congressional statement of findings and purpose." ADEA § 2(a), 29 U.S.C. § 621(a).

If an added goal of the ADEA beyond its stated "purpose . . . to promote the employment of older persons," ADEA § 2(b), 29 U.S.C. § 621(b), was to prevent discrimination on the basis of youth, that purpose was conspicuously absent from the contemporaneous justifications for the legislation given by Congress and the administration. Significantly, the Senate and House Committee Reports, both of which identify the "employment of older workers" as the purpose of the bill, *see* H.R. Rep. No. 90-805, at 1 (1967); S. Rep. No. 90-723, at 1 (1967), show no intent to prohibit employers from treating older workers more favorably than younger workers. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (holding that Committee Reports on a bill are "the authoritative source for finding the Legislature's intent").[8]

---

[8] In the volumes of speeches, testimony, and reports taken by both houses, the notion that the ADEA could protect older workers from being discriminated against for being too young was raised only once. During the Senate floor debate, Senator Yarborough indicated that he

The legislative history of the subsequently-enacted Older Worker Benefits Protection Act ("OWBPA"), confirms that the ADEA has never prohibited more favorable treatment of older workers. As explained above, § 4(f)(2)(B) permits an employer to provide less benefits to older workers, as long as the cost incurred by the employer on behalf of the older worker is "no less than" that incurred on behalf of the younger worker. 29 U.S.C. § 623(f)(2)(B). When asked by a Member of Congress whether the "no less than" language allowed one to "discriminate on behalf of older workers," then-EEOC General Counsel Charles A. Shanor, answered "That is correct." And Vice Chairman R. Gaull Silberman immediately volunteered, "That has always been the case." *Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision, Joint Hearing before the Select House Comm. on Aging and the Subcomm. on Employment Opportunities and Labor-Management Relations of the Comm. on Education and Labor*, 101st Cong. 77 (Sept. 21, 1989).[9]

---

understood the law to have that effect. Cong. Rec. S15896 (Nov. 6, 1967) (stating belief that ADEA prohibits age discrimination "whichever way" the decision is made). But this isolated comment was not adopted by the Senate Committee Report explaining the bill's provisions, and therefore should be given no authoritative weight. This Court "eschew[s] reliance on the passing comments of one Member, and casual statements from the floor debates." *Garcia*, 469 U.S. at 76 (citation omitted). Committee reports are "'more authoritative' than comments from the floor." *Id.*

[9] Similarly, the American Association of Retired Persons, in written responses to questions made part of the Senate report on the OWBPA, clarified that "spending less for a benefit for a younger worker would not violate the [OWBPA]," and that "'reverse discrimination'

C. This Court's Decision in *O'Connor v. Coin Caterers Corporation* Further Confirms That the ADEA Prohibits Only Discrimination Based on Old Age.

The Sixth Circuit's reading of § 4(a)(1) is also at odds with this Court's decision in *O'Connor v. Coin Caterers Corp.*, 517 U.S. 308 (1996). In that case, the Court held that to establish a prima facie case of age discrimination, a plaintiff must show that he was treated less favorably than a "substantially younger" worker. *O'Connor*, 517 U.S. at 313. An ADEA plaintiff obviously cannot make such a showing if he was treated less favorably than an *older* worker.

O'Connor unanimously held that the ADEA "bans discrimination against employees because of their age," not "because they are aged 40 or older." 517 U.S. at 312. The question in that case was whether a plaintiff alleging that he was discharged in violation of the ADEA was required to show that he was replaced by someone outside the protected age group (forty and older) to make out a prima facie case of discrimination. *Id.* at 309. This Court rejected that requirement, holding that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id.* at 313. The Court derived its "substantially

---

cases have never been successful or seriously contemplated under the ADEA." *Older Workers Benefit Protection Act: Joint Hearing before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Special Comm. on Aging*, 101st Cong. 186-87 (Sept. 27, 1989).

younger" test from the objectives of the statute, expressly formulating a prima facie case that would be a proxy for the discrimination that the Act forbids, *i.e.*, discrimination against older workers based on their relatively advanced age. *Id.* at 311-12 (holding "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption'") (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981)).

To interpret the Act as protecting all workers forty and older from all forms of age-related preferential treatment for all other employees, would be to conflate discrimination against older workers with "40 or over" discrimination – precisely the error condemned in *O'Connor*. *Id.* at 312. A claim under the ADEA depends on the relative ages of the individual plaintiff(s) and the preferred employee(s) (who must be substantially *younger*), not on membership in the protected class. The Sixth Circuit thus misread the statute by interpreting § 12 as defining the meaning of "individual" for purposes of the prohibition against age discrimination in § 4. Pet. App. 6a. As *O'Connor* makes clear, § 12 merely establishes the age limit for eligibility for ADEA protection. It cannot be read in conjunction with § 4 to define a class of "individuals" who are automatically entitled to equal treatment simply because they are forty and over. Thus, the Sixth Circuit's decision cannot be squared with this Court's decision in *O'Connor* and should be rejected for that reason, as well.

D. The Sixth Circuit's Interpretation of the ADEA Is Irreconcilable with Thirty-Five Years of Precedent.

In view of the clarity of Congress's meaning in § 4(a)(1) and the ADEA generally, it is not surprising that, apart from the Sixth Circuit in this case, virtually every federal court to consider the question has held that the ADEA does not allow suits based on *youth* discrimination, even by individuals forty and older. *See Hamilton*, 966 F.2d at 1227 (holding that the ADEA "does not protect the young as well as the old, or even . . . the younger against the older") (quotation marks and citation omitted); *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.) (noting that ADEA "does not forbid treating older persons *more* generously than others"); *Lawrence v. Town of Irondequoit*, 246 F. Supp. 2d 150, 161 (W.D.N.Y. 2002) (rejecting ADEA claim arising from more favorable treatment of older employees); *Dittman v. General Motors Corp.*, 941 F. Supp. 284, 287 (D. Conn. 1996) (adopting reasoning of *Hamilton* and noting that "ADEA does not bar discrimination against the young in favor of the old"), *aff'd*, 116 F.3d 465 (2d Cir. 1997) (unpublished table decision); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995) ("The ADEA has never been construed to permit younger persons to claim discrimination against them in favor of older persons. Indeed, the existence of a minimum age requirement suggests that it was only discrimination *in favor of* younger individuals that the law is designed to prohibit."); *Wehrly v. American Motors Sales Corp.*, 678 F. Supp. 1366, 1380-83 (N.D. Ind. 1988) ("It would certainly be an anomaly if an employer was held liable under the Age Discrimination in Employment Act for failing to offer special early retirement

to an employee who was too young to qualify. Such a result would not serve the purpose of the Act, would make little sense, and would find no support in the case law."); *see also Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995) (noting district court's adherence to *Hamilton*).[10]

But the incongruity of the Sixth Circuit's approach runs far deeper. Much of the doctrine developed in the federal courts setting forth the proof and defenses of ADEA violations would make little sense if the Sixth Circuit's reading of § 4(a)(1) were adopted. That the Sixth Circuit's interpretation cuts so sharply against the grain of this precedent counts powerfully against it. *See Dastar*, 123 S. Ct. at 2047.

---

[10] The Sixth Circuit cited two cases as contrary authority – *Rannels v. Hargrove*, 731 F. Supp. 1214, 1220-21 (E.D. Pa. 1990); *Mississippi Power and Light Co. v. Local Union Nos. 605 and 985, Int'l Bhd. of Elec. Workers*, 945 F. Supp. 980 (S.D. Miss. 1996), *aff'd*, 105 F.3d 551 (5th Cir. 1996) (unpublished table decision). Neither is apposite. *Rannels* did not involve the ADEA at all, but instead concerned the Age Discrimination Act (ADA). The ADA was not limited to workers over the age of forty, and the district court's reasoning in that case has no bearing on whether the ADEA, which is specifically targeted at older workers, supports "reverse age discrimination" claims. *See* 731 F. Supp. at 1220 (noting that ADA "nowhere contains any limitations or exclusions directed towards any age-based group"). *Mississippi Power and Light* involved claims that the employer's policy discriminated against two classes of workers – those too old and those too young to obtain the benefit – and that case therefore does not directly address whether medical benefits may be unlawfully discriminatory solely because they are unavailable to workers younger than the minimum qualifying age. *See* 945 F. Supp. at 985 (noting policy disfavored workers under 60 and over 65). To the extent that decision supports the Sixth Circuit's decision, it is the only case that does so.

The kinds of inferences and presumptions that courts have approved in ADEA cases are uniformly premised on the understanding that the ADEA protects workers from being discriminated against on the ground that they are too old. None presupposes that workers forty and older may bring "youth discrimination" claims. For example, in cases of layoffs and reductions in force – one of the most common contexts in which ADEA claims arise – the courts look to the overall before-and-after picture of the affected workforce to determine if layoff criteria were in fact discriminatory against older workers.[11] That being so, an employer's showing that he or she retained at least a proportionate number of older workers during layoffs militates against discrimination claims by older workers in this context.[12] Under the Sixth Circuit's reading, however, retaining older workers during a layoff would constitute "smoking gun"

---

[11] *See, e.g., Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1245 (7th Cir. 1992) (reversing summary judgment in employer's favor where employer laid off 10 of 27 older employees but only one of 25 younger employees as part of reduction-in-force plan); *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1110-11 (1st Cir. 1989) (holding in layoff case that plaintiff need not prove replacement by a younger worker, but rather that "younger persons were retained in the same position"); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 642-43 (5th Cir. 1985) (stating that employee could establish prima facie case of discrimination through "circumstantial evidence that younger employees were more favorably treated than older employees" in a reduction-in-force plan).

[12] *See, e.g., EEOC v. Clay Printing Co.*, 955 F.2d 936, 939-40, 943 (4th Cir. 1992) (affirming summary judgment for employer in age discrimination layoff case where average age of employees went up as a result of layoffs); *Goetz v. Farm Credit Servs.*, 927 F.2d 398, 405-06 (8th Cir. 1991) (affirming summary judgment for employer where average age of workforce remained same after layoffs).

evidence establishing a separate ADEA violation with respect to a different class of plaintiffs – those forty or over who were let go. *See, e.g.*, *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 426 (4th Cir. 2000).

Similarly, the age of the decisionmaker is routinely held to be relevant to whether an inference of discrimination can permissibly be established from an adverse employment decision. If the decisionmaker is forty or older, that fact tends to rebut an inference of discrimination. No case law suggests that an employer can rebut a claim of discrimination by showing that the decisionmaker, like the plaintiffs here, was younger than the employees subject to allegedly adverse treatment.[13]

In this regard, it is no accident that the Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.* concluded that discriminatory intent could be inferred only when an employer passed over a qualified person forty or older in favor of someone "substantially younger." Prior to that decision, the only disagreement among the lower courts was whether the younger person also needed to be outside the protected class.[14] If the Act allowed claims by younger

[13] *See, e.g.*, *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) ("[Plaintiff] faces a difficult burden here, because all of the primary players behind his termination . . . were well over age forty and within the class of persons protected by the ADEA.").

[14] *Compare Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1335 n.2 (1st Cir. 1988) (prima facie case of age discrimination under the ADEA does not require that replacement be outside of protected class); *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1374 (2d Cir. 1989) (noting same in dicta); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985) (replacement by worker outside of protected

workers as well as by older ones, these inferences would have no persuasive value, as they would have no "logical connection" to proving or disproving the discrimination forbidden by the Act. *See O'Connor*, 517 U.S. at 311.

E. Section 4(f)(2)(B)(i) of the ADEA Also Forecloses Respondents' Claims.

Respondents' claims, and the Sixth Circuit's holding that they may proceed, are also irreconcilable with § 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i). That provision presupposes that an employer may treat older workers more favorably than younger workers, and makes clear that an employer does not violate the ADEA by doing so.

Under § 4(f)(2)(B)(i), an employer may spend as much as it likes on benefits for older workers, as long as the costs it incurs are "no less than [the costs] . . . incurred on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i). The provision was added to the ADEA (in the wake of this Court's decision in *Betts*) to provide employers with a defense against discrimination claims brought by older

class not element of prima facie case); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994) (same); *Rinehart v. City of Independence*, 35 F.3d 1263, 1265 (8th Cir. 1994) (same); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988) (same); *Corbin v. Southland Int'l Trucks*, 25 F.3d 1545, 1549 (11th Cir. 1994) (same); *with Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (element of prima facie case is that replacement come from outside protected class); *Price v. Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir. 1977) (same); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (same).

workers claiming that they had received less generous benefits than comparatively younger workers. It provides that employers have acted lawfully so long as they spend at least as much on the benefits provided older workers as they spend on benefits for comparatively younger workers.

Critically for present purposes, the provision does not mandate equal treatment of all employees forty or older, either with respect to benefit levels or the amount an employer spends for benefits. What it requires is that the employer spend "no less" on the older worker than the younger. Under this provision, an employer can be more generous to older workers than to comparatively younger workers without violating the ADEA. By its plain terms, then, § 4(f)(2)(B)(i) confirms that the ADEA permits an employer to do precisely what General Dynamics did here.

Indeed, § 4(f)(2)(B)(i) immunizes the conduct at issue in this case wholly apart from whether "youth discrimination" claims might otherwise be brought under the ADEA by those forty or older, and therefore provides an independent reason for reversing the Sixth Circuit. Section 4(f)(2)(B)(i) provides that it "shall not be unlawful for an employer" to "take any action otherwise prohibited under subsection (a), (b), (c), or (e)" of the ADEA in order to "observe the terms of a bona fide employer benefit plan" where "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. § 623(f)(2)(B)(i).

It is clear from the face of respondents' complaint itself that the retiree health benefits General Dynamics offered its employees pursuant to CBA2 fulfill the requirements of § 4(f)(2)(B)(i).[15] It is undisputed that General Dynamics' retiree health insurance plan in CBA2 is a "bona fide employee benefit plan" under applicable law. *See* 29 C.F.R. § 1625.10(b) (defining such plans). It is equally undisputed that "the actual amount of payment made . . . on behalf of an older worker is no less than that made . . . on behalf of a younger worker." § 4(f)(2)(B)(i). The gravamen of respondents' case is, after all, that General Dynamics is spending *more* on retiree health benefits for those fifty and over than for the respondents (who are not eligible for such benefits at all). And it is beyond question that the retiree health insurance plan is consistent with § 1625.10 of title 29, Code of Federal Regulations, as in effect on June 22, 1989. In addition to requiring that a plan be a "bona fide employee benefit plan" and that the employer be observing the plan (both of which are clear here), § 1625.10 provides that the plan may not be a "subterfuge" to evade the purposes of the Act. The regulation defines a subterfuge as a plan that provides for lower benefits for older workers than for younger workers in situations where the employer has not shown that the lower benefits are justified by cost considerations. 29 C.F.R. § 1625.10(d). The benefits offered by General Dynamics in this case plainly are not a "subterfuge" within the meaning of that provision.

---

[15] *See generally Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996) (holding that dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is "appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense"); *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (same).

Thus, even if the retiree health benefits offered by General Dynamics in this case were "otherwise prohibited" by the ADEA – and they clearly are not prohibited – § 4(f)(2)(B)(i) unambiguously authorizes General Dynamics to offer those benefits.

F. The EEOC Guideline Cited by the Sixth Circuit Provides No Basis for Interpreting the ADEA to Prohibit Providing Older Workers with Benefits Not Available to Younger Workers.

The Sixth Circuit's reading of § 4(a)(1) cannot be sustained on the basis of the EEOC guideline the decision cites. *See* Pet. App. 10a (citing 29 C.F.R. § 1625.2).

The guideline fairly read does not authorize challenges like the one here. In stating that an employer may not "discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over," 29 C.F.R. § 1625.2(a), the guideline merely sets forth the rule established by this Court in *O'Connor* – that is, the guideline authorizes older employees to sue on the basis of discrimination as compared to younger employees who are forty or older.[16] To read it otherwise would make the just

[16] The guideline goes on to state that "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor." 29 C.F.R. § 1625.2. That language is ambiguous, and can certainly be read to forbid considering the advanced age with respect to either employee as a negative factor, not to forbid preferring the older to the younger worker on the basis of his chronological age.

quoted paragraph (a) inconsistent with the regulation's paragraph (b), which permits extension of additional benefits to older workers within the forty and over class, as long as the additional benefits are to "counteract problems related to age discrimination." 29 C.F.R. § 1625.2(b). If "age discrimination" could run both ways, then no act taken to benefit anyone, older or younger, that was based on age could be justified as counteracting "age discrimination."

If, however, the guideline is read to express the view that the ADEA should apply in the present context, it should not be followed. The provision does not have the force of law. It is an "interpretative rule[] or statement[] of policy" issued to guide the EEOC's "performance of its administrative and enforcement duties under the Act." 46 Fed. Reg. 47724, 47724 (Sept. 29, 1981).[17] Such interpretative guidelines are not controlling, receive at most *Skidmore* deference, and are entitled to respect only to the extent they are persuasive. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); *United States v. Mead*, 533 U.S. 218, 228 (2001).

Here, the EEOC's guideline is not the least bit persuasive. To the contrary, as demonstrated *supra*, it is plain from the language, structure, and purpose of the statute itself, as well as the legislative history, that Congress sought to prohibit only discrimination based on old age. As the Seventh Circuit concluded after considering the regulation,

[17] The EEOC made a deliberate choice to place § 1625.2 in a subpart of the rules entitled "Interpretations," rather than in the "Substantive Regulations" subpart. *Compare* 29 C.F.R. § 1625 Subpart A *with* 29 C.F.R. § 1625 Subpart B.

"to the extent that regulation 1625.2 can be read to authorize reverse age discrimination suits, we think that it exceeds the scope of the statute." *Hamilton*, 966 F.2d at 1228.[18] Moreover, as will be demonstrated more fully *infra*, such a reading would be patently unreasonable because it would presumptively outlaw widely used and socially positive employment practices, in order to address a problem (employment discrimination against those forty and over on the ground that they are too young) that there is no reason to think exists. That is doubtless why, in the thirty-five year history of the ADEA, neither the EEOC nor the Department of Labor has ever enforced the provision judicially, notwithstanding the ubiquity of employment practices that would be inconsistent with the interpretation.

II. INTERPRETING THE ADEA TO AUTHORIZE SUITS BY YOUNGER WORKERS CHALLENGING PREFERENCES GIVEN TO OLDER WORKERS WOULD DEFEAT SETTLED EXPECTATIONS AND HAVE SEVERE PRACTICAL CONSEQUENCES.

Adopting the Sixth Circuit's novel and counterintuitive reading of the ADEA would also generate "serious practical problems" that provide a powerful additional reason for rejecting that interpretation. *See Dastar Corp.*, 123 S. Ct. at 2049.

Most importantly, the Sixth Circuit's endorsement of "youth discrimination" claims by those forty or older would

[18] Thus, the EEOC guideline would be invalid even under the standards of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

make presumptively unlawful employment practices that are virtually ubiquitous, and would deny employers the right to offer (and employees the right to seek through collective bargaining) socially positive benefit plans. Retiree health benefits of the kind at issue here illustrate the problem. One widely respected study demonstrates that in 2002 less than 1% of employers offering retiree health benefits to employees before they reach age sixty-five, and 3% of employers providing such benefits for employees 65 and older, based benefit eligibility on years of service alone. *See The Current State of Retiree Health Benefits: Findings From the Kaiser/Hewitt 2002 Retiree Health Survey*, 2, 4 (Dec. 2002), available at http://www.kff.org/content/2002/20021205a/. Another similar study demonstrates that 64% of employers with 1,000 or more employees maintained eligibility criteria for retiree health coverage that required employees both to be at least fifty years old and to have satisfied a years of service requirement. Paul Fronstein & Dallas Salisbury, *Retiree Health Benefits: Savings Needed to Fund Health Care in Retirement*, Employee Benefit Research Institute, Issue Brief No. 254, at 9 (Feb. 2003), *available at* http://www.ebri.org/pdfs/0203ib.pdf.

The reason for such age-based criteria is obvious. Retiree health insurance is extraordinarily expensive. If employers must offer equivalent benefits to all employees forty and older, many will decline to offer the benefit to anyone. Particularly in times of economic uncertainty, employers are faced with the need to scale back generous benefits programs; in many cases, the choice they face is between offering a retirement or other benefit only to some employees, or offering it to none. As the district court recognized, in this case General Dynamics lawfully could

have withdrawn the benefit from all its current employees. Pet. App. 24a. If employers were no longer permitted to offer more favorable benefits plans to older workers, the result might well be that no workers would receive benefits at the same level as older workers currently do. *See, e.g., Hamilton*, 966 F.2d at 1228 (refusing "to open the floodgates to attacks on every retirement plan"). This outcome would have the perverse effect of harming the very group of older workers whose employment opportunities the ADEA is designed to promote.

Additionally, there are often very good reasons for affording greater benefits to older workers. Many changes to employee benefit plans treat older workers more favorably to account for the fact that they will have fewer working years to recover from the change or to "grandfather" employees who are about to retire into benefits upon which they have relied. For example, an employer converting from a defined benefit plan to a defined contribution plan might allow workers close to retirement – whose benefits are about to come to fruition – to remain in the defined benefit plan. Such an action would be unlawful under respondents' view of the statute. Instead, employers would be required to treat all workers over forty identically, without regard for the "problems arising from the impact of age on employment." ADEA § 2(b), 29 U.S.C. § 621(b). *See, e.g., Karlen*, 837 F.2d at 318 (noting that if "workers 40 or older but younger than the age of eligibility for early retirement could complain . . . early retirement plans would effectively be outlawed, and that was not the intent of the framers of the Age Discrimination in Employment Act").

Holding that the ADEA forbids an employer from treating older workers more favorably than younger workers also would be inconsistent with many provisions of ERISA and the tax code. These statutes recognize that it is a salutary policy to provide benefits for older workers that are not available to younger workers. Indeed, in some circumstances, Congress has mandated preferential treatment for older workers. *See, e.g.*, 26 U.S.C. § 401(a)(28)(B)(iii) (providing that employee 55 or older must be allowed to diversify account under Employee Stock Ownership Plan, a benefit not extended to younger employees); 26 U.S.C. § 72(t)(2)(A)(i) (waiving 10% tax on early distributions from qualified retirement plans for workers who reach age 59½). Adoption of the Sixth Circuit's ruling would call these and similar provisions into doubt, and would, at a minimum, require courts to engage in the unwieldy task of reconciling these provisions with the contradictory prohibition against youth discrimination. At the very least, the fact that Congress has repeatedly *required* and even more frequently authorized, employment practices that grant preferential treatment to employees significantly older than forty and not to all employees forty or older provides a powerful caution against concluding that Congress in the ADEA intended to make such employment practices presumptively unlawful as a general matter.

More generally, construing the ADEA to authorize employees who are over forty to bring suit when they are treated less favorably than older employees would infuse a new across-the-board rigidity into employment decisions, and would prevent employers from accommodating the special needs of older workers. Because the ADEA applies to all incidents of the employment relationship, employers

seeking to fulfill the ADEA's stated purposes of "promot[ing] employment of older persons" and "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment," would be prevented from offering those older workers any preferential treatment or incentives. ADEA § 2(b), 29 U.S.C. § 621(b). For example, law enforcement agencies that maintain rigorous physical fitness requirements would likely be precluded from relaxing those standards for sixty-year-olds to facilitate their retention unless they did the same for forty-year-olds. *See, e.g.*, *Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996) (describing U.S. Marshals Service's use of physical fitness component, with age-based sliding scale, in promotion decisions). Employers would either have to relax standards for all employees over forty or cease their efforts to promote the employment of older workers – thereby defeating the ADEA's express goal of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." ADEA § 2(b), 29 U.S.C. § 621(b). This Court should not be "disposed to give the statute a meaning that produces such strange consequences." *Deal*, 508 U.S. at 134.

Such a construction of the statute also would greatly increase the burdens associated with complying with the statute and would subject employers to a plethora of lawsuits. Whenever an employer were to take an employment action with respect to anyone forty or over, the employer would have to examine its action with respect not only to those who are older, but also to those who are younger. And any time someone forty or over were disfavored in any way, he would have a potential claim regardless of whether the preferred person were younger or

older. Because age, unlike race or sex, does not confer membership in a discrete, readily ascertainable category, any workforce of any size contains a "virtually infinite number of age subgroups," *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999), and thus any employment practice that disproportionately impacts some identifiable cohort of those forty or older might now be actionable – if not on an age discrimination theory, then on a reverse discrimination theory. Employers would be forced to ensure at least rough proportionality across every age cohort over forty, lest they disproportionately disfavor one subgroup and thereby subject themselves to potential liability and litigation expense limited only by the ingenuity of class action plaintiffs' lawyers.

The many deleterious consequences that would result from the Sixth Circuit's counterintuitive interpretation of the ADEA would be reason enough to reject "youth discrimination" claims under the ADEA even if some offsetting benefit could be achieved by recognizing such claims. But the Sixth Circuit has identified no such benefit, and none exists. There is no reason to think that employment discrimination against those forty and older on the ground that they are too young is a pervasive social problem warranting a sweeping regulatory response of the kind the Sixth Circuit's decision would impose – a response that would dramatically curtail employers' freedom of action and potentially deny millions of workers benefits they now have. Indeed, there is no reason to think – and certainly no evidence before Congress or this Court – that "youth discrimination" occurs with any frequency at all. Thus, there is no basis for concluding that Congress would have intended the ADEA to authorize workers forty or older to complain

that they have been treated unfavorably compared to older workers. A practical assessment of the ADEA's actual operation therefore powerfully reinforces the conclusion that the statute's text, structure and legislative history establish: the ADEA protects individuals from being discriminated against because they are too old, not because they are too young.

CONCLUSION

The decision of the Sixth Circuit should be reversed.

Respectfully submitted,

WILLIAM J. KILBERG
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

DONALD B. VERRILLI, JR.
Counsel of Record
DEANNE E. MAYNARD
JARED O. FREEDMAN
MARTINA E. VANDENBERG
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

July 7, 2003

43
93D

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 02-1080

In the Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

MARK W. BIGGERMAN
Counsel of Record
ERIN STOTTLEMYER GOLD
REMINGER & REMINGER CO., L.P.A.
1400 MIDLAND BUILDING
101 PROSPECT AVENUE WEST
CLEVELAND, OH 44115-1093
(216) 687-1311

Counsel for Respondents

E. BRUCE HADDEN
HADDEN CO., L.P.A.
132 NORTHWOODS BLVD.
COLUMBUS, OH 43232
(614) 431-2000

JOANNE C. BRANT
KEVIN D. HILL
NANCY PAINE SABOL
OHIO NORTHERN UNIVERSITY
PETTIT COLLEGE OF LAW
ADA, OH 45810
(419) 772-2228

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

BEST AVAILABLE COPY

59 pp

QUESTION PRESENTED

Whether the plain meaning of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, prohibits General Dynamics from withdrawing retirement health benefits from workers solely because of their age.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are named in Petitioner's Brief at pages ii-iii. Respondents do not have any corporate affiliations.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. THE PLAIN MEANING OF THE ADEA PROHIBITS GENERAL DYNAMICS FROM WITHDRAWING RETIREMENT HEALTH BENEFITS FROM EMPLOYEES BECAUSE OF THEIR AGE 10

A. Sections 4(a)(1) and 12(a) of the ADEA Plainly Express Congress' Intent to Protect All Persons Age Forty and Older from Age Discrimination . 10

B. The CBA2 Clearly Discriminates on the Basis of Age 14

II. THE PLAIN-MEANING INTERPRETATION OF THE ADEA IS SUPPORTED BY THE PARALLEL STRUCTURE OF OTHER NONDISCRIMINATION LAWS 18

III. 29 C.F.R. §1625.2 CONFIRMS THE PLAIN-MEANING INTERPRETATION OF THE ADEA AND IS ENTITLED TO *CHEVRON* DEFERENCE 21

A. 29 C.F.R. §1625.2 is Clear and Accords With the Plain Meaning of the ADEA 21

B. 29 C.F.R. §1625.2 Is Entitled to *Chevron* Deference 26

IV. AN EEOC POLICY STATMENT CONFIRMS THE PLAIN-MEANING INTERPRETATION OF THE ADEA AND IS ENTITLED TO *SKIDMORE* RESPECT 31

V. THIS COURT'S DECISION IN *CONSOLIDATED COIN* IS CONSISTENT WITH THE PLAIN MEANING OF THE ADEA 32

VI. CONSIDERATION OF SECTION 4(f)(2)(B)(1) IS NOT POSSIBLE ON THE PRESENT RECORD 34

VII. THE PLAIN-MEANING INTERPRETATION OF THE ADEA WILL NEITHER DISRUPT SETTLED EXPECTATIONS NOR PROSCRIBE WIDESPREAD EMPLOYMENT PRACTICES 37

VIII. THE DECISIONS OF THE LOWER FEDERAL COURTS ARE INAPPOSITE 41

CONCLUSION 46

TABLE OF AUTHORITIES

CASES

Adams v. Fla. Power Corp., 122 S. Ct. 643 (2001) . . . 15

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) . . . 36

Albright v. Oliver, 510 U.S. 266 (1994) 34

Ardestani v. INS, 502 U.S. 129 (1991) 10

Bragdon v. Abbott, 524 U.S. 624 (1998) 29

Busic v. United States, 446 U.S. 398 (1980) 40

Cass County v. Leech Lake Band of Chippewa Indians,
524 U.S. 103 (1998) 36

Chevron v. Echazabal, 536 U.S. 73 (2002) 29

Chevron v. Nat'l Res. Def. Council, Inc.,
467 U.S. 837 (1984) 21, 22, 24, 26- 29

Conn. Nat'l. Bank v. Germain, 503 U.S. 249 (1992) . . 11

Desert Palace, Inc. v. Costa, 539 U.S. 148 (2003) 11

DeShaney v. Winnebago County Dep't of Social Serv.,
489 U.S. 189 (1989) 36

Dothard v. Rawlinson, 433 U.S. 321 (1977) 36

Edelman v. Lynchburg Coll., 535 U.S. 106 (2002) 29

EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) . . 32

EEOC v. Commercial Office Prods. Co.,
486 U.S. 107 (1988) 29

Gratz v. Bollinger, 123 S.Ct. 2411 (2003) 14

Grutter v. Bollinger, 123 S. Ct. 2325 (2003) 14

Hamilton v. Caterpillar, Inc.,
966 F.2d 1226 (7th Cir. 1992) 5-7, 16, 17, 41, 42

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 15, 33, 38, 43

Karlen v. City Colleges of Chicago,
837 F.2d 314 (7th Cir. 1988),
cert. denied, 486 U.S. 1044 . . . . . 44, 45

Lorillard v. Pons, 434 U.S. 575 (1978) 15

Los Angeles Dep't of Water and Power v. Manhart,
435 U.S. 702 (1978) 15

Matsushida Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996) 36

McDonald v. Santa Fe Trail Trans. Co.,
427 U.S. 273 (1976) 15, 19

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 6, 15, 32, 43, 44

Morton v. Mancari, 417 U.S. 535 (1974) 40

Nat'l Org. for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) 13

Nat'l R.R. Pass. Corp. v. Abner Morgan, Jr.,
536 U.S. 101 (2002) 32

Nev. Dep't of Human Res. v. Hibbs,
123 S.Ct. 1972 (2003) 19

Newport News Shipbldg & Dry Dock Co. v. EEOC,
462 U.S. 669 (1983) 16

O'Connor v. Consol. Coin Caterers Corp.,
517 U.S. 308 (1996) 6, 9, 15, 32, 33

Oncale v. Sundowner Offshore Serv., Inc.,
523 U.S. 75 (1998) 18

Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) . 10, 13

Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,
469 U.S. 189 (1985) 10

Peralta v. Heights Med. Ctr., Inc.,
485 U.S. 80 (1988) 36

Preiser v. Rodriguez, 411 U.S. 475 (1973) 40

Pub. Employees Ret. Sys. of Ohio v. Betts,
492 U.S. 158 (1989) 34

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 39

Reeves v. Sanderson Plumbing Prod., Inc.,
530 U.S. 133 (2000) 15

Rubin v. United States, 449 U.S. 424 (1981) 11

Scheuer v. Rhodes, 416 U.S. 232 (1974) 34

Schuler v. Polaroid Corp.,
848 F.2d 276 (1st Cir. 1988) 41, 43, 44

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 10

Skidmore v. Swift, 323 U.S. 134 (1944) 27, 29-32

Smith v. Robinson, 468 U.S. 992 (1984) 39

Steelworkers v. Weber, 443 U.S. 193 (1979) 7, 14

Sutton v. United Air Lines, Inc.,
527 U.S. 471 (1999) 28

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 15

United States v. Am. Trucking Ass'ns,
310 U.S. 534 (1940) 10-11

United States v. Gaubert, 499 U.S. 315 (1991) 34

United States v. Mead, 533 U.S. 218 (2001) 28

Variety Corp. v. Howe, 516 U.S. 489 (1996) 5, 13

Watt v. Ala., 451 U.S. 259 (1981) 39

Youngberg v. Romeo, 457 U.S. 307 (1982) 36

CONSTITUTIONAL PROVISION, STATUTES, REGULATIONS AND RULE

U.S. CONST. art. VI, cl. 2 7

28 U.S.C. § 1254 (1) 1
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
29 U.S.C. § 621 . . . . . 12, 36
29 U.S.C. § 621 (a) (1) 33
29 U.S.C. § 621 (a) (2) 17, 33
29 U.S.C. § 621 (b) 17, 33
29 U.S.C. § 623 (a) 2
29 U.S.C. § 623 (a) (1) 4
29 U.S.C. § 623 (f) (1) 38
29 U.S.C. § 623 (f) (2) 16
29 U.S.C. § 623 (f) (2) (A) 38, 43
29 U.S.C. § 623 (f) (2) (B) 35, 38, 40
29 U.S.C. § 623 (f) (2) (B) (i) 34, 42
29 U.S.C. § 623 (i) 13
29 U.S.C. § 623 (l) (1) (A) 38
29 U.S.C. § 628 . . . . . 27, 28
29 U.S.C. § 631 (a) 2
29 U.S.C. § 706(7) 20
42 U.S.C. § 12111(8) 20
42 U.S.C. § 2000 (e) . . . . . *passim*
42 U.S.C. § 2000-12 (a) 28

29 C.F.R. § 1625.2 . . . . . 21, 23-24, 26-32
29 C.F.R. § 1625.2 (a) 24
29 C.F.R. § 1625.2 (b) 24-26, 42
29 C.F.R. § 1625.10 . . . . . 35, 40
29 C.F.R. § 1625.10 (a) (1) 45

29 C.F.R. § 1625.10 (d) 45

FED. R. CIV. P. 12(b)(6) 3, 34-35

LEGISLATIVE MATERIALS

43 Fed. Reg. 19,807 (May 9, 1978) 27

44 Fed. Reg. 1053 (Dec. 28, 1978) 27

44 Fed. Reg. 68,860 (Nov. 30, 1979) 28

46 Fed. Reg. 47,726 (Sept. 29, 1981) 28

MISCELLANEOUS

American Heritage Dictionary (3rd ed. 1992) 12, 25

American Heritage Dictionary of the English Language 32 (4th ed. 2000) 12

Cases Involving the Extension of Additional Benefits to Older Workers (EEOC Policy Guidance, N-915.029, June 1988) . . 31

Charles Alan Wright, *et al.*, 5A FEDERAL PRACTICE AND PROCEDURE (2d ed. 1986) 34

The Compact Oxford English Dictionary 28 (2d ed. 1999) 12

Encarta World English Dictionary 29 (1999) 12

James Wm. Moore *et al.*, 2 MOORE'S FEDERAL PRACTICE (3rd ed. 2000) 34

The New Lexicon Webster's Dictionary of the English Language 15 (1987) 12

Norman J. Singer, 2A STATUTES AND STATUTORY CONSTRUCTION (6th ed. 2000) 14

Random House Dictionary (2d ed. 1987) 12, 16

Random House Unabridged Dictionary 37 (2d ed. 1993) 12

S. Rep. No. 90-723 (1967) 21

Webster's Third New International Dictionary (1981) 12, 16, 25

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, reported at 296 F.3d 466 (6th Cir. 2002), is reprinted at Pet. App. 1a-20a. The decision of the United States District Court for the Northern District of Ohio granting Petitioner's motion to dismiss, reported at 98 F. Supp. 2d 846 (N.D. Ohio 2000), is reprinted at Pet. App. 21a-25a. The order of the United States Court of Appeals for the Sixth Circuit, denying rehearing *en banc*, is set forth at Pet. App. 26a-27a.

JURISDICTION

The district court had federal question jurisdiction over Respondents' claims under the Age Discrimination in Employment Act of 1967 ("ADEA" or "the Act") pursuant to 28 U.S.C. §1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. §1291. The judgment of the court of appeals was entered on July 22, 2002. Petitioner filed a timely petition for rehearing, which the court of appeals denied on September 19, 2002. Pet. App. 26a-27a. On December 6, 2002, Justice Stevens extended the time within which to file a petition for a writ of *certiorari* to and including January 17, 2003. *See* Application No. 02A468. The petition for writ of *certiorari* was filed January 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Two provisions of the ADEA are pivotal in this litigation. The first is the ADEA's nondiscrimination mandate, section 4(a)(1), which provides in pertinent part:

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

29 U.S.C. §623(a).

The second operative section is the ADEA's age limitation, section 12(a) of the Act, which provides:

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

29 U.S.C. §631(a).

STATEMENT OF THE CASE

Dennis Cline and his fellow employees ("Respondents" or "Employees") work or worked at Petitioner, General Dynamics Land Systems, Inc.'s ("General Dynamics") plants in Lima, Ohio, or Scranton, Pennsylvania, where they manufacture and assemble the M1 A-1 Abrams Tank and other equipment for the United States Armed Forces. JA at 8-9. Each individual Respondent suffered a unique and personal injury as a result of the Petitioner's discriminatory action, but the Employees can be broadly classified into three groups.

The first group consists of employees like Dennis Cline, who continue to work for Petitioner but will not receive health and medical benefits upon retirement, no matter how long they work for Petitioner. *Id.* at 8. The second group, known

as the "Babb" Group, are those who retired prematurely from General Dynamics to avoid having General Dynamics rescind their health and medical benefits. *Id.* at 8-10. The third group, referred to as the "Diaz" Group, are those individuals who retired after Petitioner's discriminatory policy went into effect. As a result, they have no health and medical benefits other than those obtained through private purchase or re-employment. *Id.*

The terms of Respondents' employment are governed by collective bargaining agreements negotiated between General Dynamics and the United Auto Workers ("UAW"). *Id.* at 9. Under the collective bargaining agreement that was in effect until mid-1997 ("CBA1"), General Dynamics provided full health benefits to all employees who retired with thirty years seniority. *Id.* at 9-10; Pet. App. at 3a. In 1997, General Dynamics and the UAW negotiated a new collective bargaining agreement ("CBA2"). JA at 9-10. Under CBA2, General Dynamics would provide health benefits on retirement only to workers who retired with thirty years of seniority and who were at least fifty years of age on July 1, 1997. *Id.*; Pet. App. at 3a; JA at 11-14. Respondents are workers who were over age forty and less than age fifty on July 1, 1997.

Respondents satisfied all statutory prerequisites and filed a timely suit in federal district court alleging violations of the ADEA and analogous state laws and requesting appropriate relief. *Id.*; Pet. App. at 3a; JA at 11-14. General Dynamics filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and the district court granted the motion. Pet. App. 21a-25a. The district court conceded that CBA2 "facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty, who are entitled to retiree health care benefits, and employees under the age of fifty,

who are not." *Id.* at 23a. However, the district court was unable to locate any other decision that had recognized a claim of what it termed "reverse age discrimination," and it declined to break new ground. The district court chose not to analyze decisions from other jurisdictions and simply held that reverse age discrimination claims are not cognizable. *Id.* at 24a.

The Employees appealed, and the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court. The Court of Appeals held that the statute means what it says. *Id.* at 11a. Judge Ryan, writing the lead opinion for the panel, thoroughly evaluated the merits of Respondents' claims and found that General Dynamics' policy violated the plain and unambiguous language of the statute. The opinion reasoned that the language of the ADEA is clear and prohibits all covered employers from discriminating "against any individual because of such individual's age." *Id.* (29 U.S.C. §623(a)(1))

Judge Ryan's opinion found numerous difficulties with Petitioner's reading of the ADEA. The opinion noted that General Dynamics was interpreting the statute rather than reading it. Petitioner's interpretation would transform the language from its statutory form -- "any individual" -- into Petitioner's term: "older workers." Pet. App. 6a. Judge Ryan then observed that even that significant alteration would be insufficient because the term "older worker" would have to be further modified to read "relatively older than any other group of employees with whom they are compared" for General Dynamics to prevail. *Id.* at 6a. The opinion concluded: "[w]e think the plain meaning of the statute will not bear that reading." *Id.*

Judge Ryan rejected the reasoning of *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), and those decisions following *Hamilton* because they erred by assigning undue weight to the "Statement of Findings and Purposes" in the ADEA and by discounting the ADEA's express prohibitions. *Id.* at 7a. It is a fundamental maxim of statutory construction that the more specific language of a statute should take precedence over generalized, hortatory language. *See Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996).

Judge Ryan also noted that references to "older workers" and "older persons" in the "Statement of Findings and Purposes" were simply not helpful in determining which older workers were entitled to the protection of the Act. Pet. App. 8a. Invoking both the statute's plain language and logic, the appellate court concluded that Congress had defined "older persons" as individuals age forty and older, and thus had chosen to protect all persons over age forty from discrimination based on their age. *Id.* Judge Ryan concluded that the plain-meaning interpretation of the ADEA would best advance Congress's avowed purpose of protecting "older workers" and "older persons." *Id.*

Judge Ryan stated that the issue before the court was not "reverse discrimination," a phrase which "has no ascertainable meaning in the law." *Id.* at 9a. Rather, the question was whether the ADEA prohibits such conduct. If so, then the conduct was discriminatory. If not, then the conduct did not amount to discrimination. *Id.* He noted that Respondents were "literally (statutorily) within the protected class." *Id.* Judge Ryan also relied upon the EEOC's interpretation of the statute, which he concluded was entitled to judicial deference. Judge Ryan observed that courts are not

permitted "to redraft anti-discrimination statutes so that they better advance the court's view of sound policy." *Id.*

Judge Cole wrote separately to emphasize that the ADEA's plain language is clear, unambiguous, and consistent with Congress' expressed purpose of protecting older workers. *Id.* at 12a, 18a. Accordingly, Judge Cole determined that there was no legally acceptable reason to look beyond the statutory language. His concurrence pointed out that the plain language does not create any internal conflicts or inconsistencies within the ADEA itself. *Id.* at 13a. Judge Cole argued cogently that the outcome was not absurd, either as a matter of reason or policy, and that it would not "open the floodgates" as the Seventh Circuit had suggested in *Hamilton*. *Id.* at 15a. He noted that courts applying state age discrimination laws in New Jersey, Oregon, Michigan, and Maine had permitted "reverse age discrimination," and the feared flood of cases had not materialized. *Id.* at 16a-18a.

Finally, Judge Cole determined that the panel's decision was consistent with the holding of this Court in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996), for three reasons. Pet. App. 17a. First, *Consolidated Coin* is not a reverse age discrimination case but one that relies on the evidentiary framework this Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which permits an inference of unlawful discrimination to be drawn in appropriate cases. Pet. App. 17a. Second, *Consolidated Coin* itself demonstrates that persons within the protected age group of the ADEA can sue each other. *Id.* Third, both cases are consistent with the statute's plain language. *Id.* Accordingly, Judge Cole concurred in the judgment and joined Judge Ryan's opinion. *Id.* at 12a.

Judge Williams' dissent rested upon the Seventh Circuit's decision in *Hamilton*. *Id.* at 18a-19a. He also said:

> the ADEA was not intended to interfere with the collective bargaining process or with collective bargaining agreements. The courts should not stand watch over labor unions who represent employees of a company and interfere[1] with their negotiations with employers.

Id. at 19a.

General Dynamics petitioned the Sixth Circuit for a rehearing *en banc*, which was denied on September 19, 2002. Pet. App. 26a-27a. General Dynamics filed its answer to the complaint on October 25, 2002. This petition followed.

SUMMARY OF ARGUMENT

The plain language of the ADEA clearly and unambiguously provides that persons age forty and older may not be discriminated against because of their age. That is precisely what General Dynamics has done in this case. The CBA2 eliminates Respondents' eligibility for retirement health benefits for one reason alone - on the effective date of the contract, the Employees were not yet fifty. This is not an

---

[1] Courts have the authority, and indeed the duty, to ensure that collective bargaining agreements do not violate federal anti-discrimination laws. *See Steelworkers v. Weber*, 443 U.S. 193 (1979). This duty is also mandated by the Supremacy Clause. U.S. Const. art. VI cl. 2. Although some degree of judicial deference to the collective bargaining process is proper, such deference cannot insulate flagrant and intentional violations of federal law.

age-based "attainment" goal, which the Employees will, if they live, have the possibility of reaching. It is the equivalent of a "snapshot," taken at a single moment in time, followed by a deliberate decision to allocate benefits based on the age of workers at the moment the "snapshot" was taken. When used in this fashion, age functions in precisely the same manner as sex, race, or any other immutable characteristic. It is beyond a workers' control, inalterable, and unrelated to job performance. Accordingly, CBA2 constitutes intentional and express age discrimination.

Petitioner terms the Employees' claim as one of "reverse discrimination," Brief for Pet'r at i, and therefore not prohibited by the ADEA. In fact, however, the Employees are indisputably within the protected class, and General Dynamics has rescinded their retirement health care benefits solely because of the Employees' ages. Such action is not "reverse discrimination–" it is simply age discrimination.

Petitioner also contends that the ADEA cannot possibly mean what it says, because the consequences of its plain meaning would be egregiously burdensome to employers. This conclusion is not supported by the evidence. However, even if true, this would be an insufficient reason to reject the plain meaning of the text. Substantial numbers of employers may wish to draw age-based lines in the allocation of benefits, yet their desires cannot override the dictates of the ADEA, in which Congress chose to make age-based line drawing presumptively unlawful. Unless some affirmative defense is available under the ADEA or another statute, employers may not withhold or condition employment benefits based on a worker's age.

The plain meaning of the ADEA is reinforced at every turn. The structure and content of other nondiscrimination

laws confirm it. The consistent, authoritative interpretations of the EEOC, expressed in a regulation, policy letter, and in opinions, ratify the plain meaning of the Act.

This Court's decision in *Consolidated Coin,* is also consistent with the plain meaning of the ADEA. In *Consolidated Coin*, this court adapted to age discrimination cases the *prima facie* proof scheme used where direct evidence is lacking. The Court refined the *prima facie* test to help the fact finder draw an inference of unlawful motivation in ADEA cases. In the present case, because the challenged conduct is a facially discriminatory policy, there is no issue regarding the employer's motivation.

Finally, a decision giving effect to the plain meaning of the ADEA will have little effect on the vast majority of employment benefit practices and early retirement practices, most of which are protected by specific exemptions in the ADEA, ERISA, or the Internal Revenue Code. The purported conflicts between the plain-meaning interpretation of the ADEA and general practices are thus illusory and will dissipate swiftly once this Court applies familiar canons of statutory construction.

In the last analysis, as the Sixth Circuit noted, a court's duty is to interpret the ADEA and not to rewrite it. Petitioner's interpretation of the Act is not acceptable because it would force sections 4(a)(1) and 12(a) to mean something other than what they say. The proper reading of the ADEA, as the Sixth Circuit held, is given by the plain meaning of the Act's operative provisions. The plain-meaning interpretation of the ADEA reads sections 4(a)(1) and 12(a) together to prohibit age discrimination against any worker age forty or older. Although this result may not have been clearly within the contemplation of Congress when the ADEA was enacted,

that does not render the statute or its interpretation absurd. As this Court recently observed, the mere fact that a statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998), quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (internal quotation omitted).

ARGUMENT

I. THE PLAIN MEANING OF THE ADEA PROHIBITS GENERAL DYNAMICS FROM WITHDRAWING RETIREMENT HEALTH BENEFITS FROM EMPLOYEES BECAUSE OF THEIR AGE.

A. Sections 4(a)(1) and 12(a) of the ADEA Plainly Express the Intent of Congress to Protect All Persons Age Forty and Older from Age Discrimination.

This Court has repeatedly held that the paramount goal in cases involving the construction of a statute is to give effect to Congress' intent. *See, e.g., Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("Our objective ... is to ascertain the congressional intent and give effect to the legislative will."). To fulfill that obligation, this Court employs a presumption that a statute's "plain meaning" accurately embodies such intent. *See, e.g., Ardestani v. INS*, 502 U.S. 129, 135 (1991) (discussing the "'strong presumption' that the plain language of the statute expresses congressional intent"); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); *United States v. Am. Trucking Ass'ns*, 310 U.S.

534, 542-43 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress... There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

These are the first principles of statutory interpretation, and they should control this litigation. This Court has consistently used plain meaning as its polestar in statutory interpretation. *See, e.g., Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148 (2003); *Amer. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Because the operative language of the ADEA is unambiguous, this Court should effectuate the clear intent of Congress, expressed in unequivocal language, to protect all persons age forty and over from age discrimination.

Petitioner seeks to narrowly focus this Court's attention upon the meaning of the term "age" in section 4(a)(1), and then struggles mightily to persuade this Court that when Congress used the term "age," it actually meant "old age" or "advanced years."[2] Brief for Pet. at 10-11, 16-28. This

---

[2] At one point, Petitioner's brief calls into question the Sixth Circuit's use of "age" in section 4(a)(1) to mean chronological age and provides alternate definitions from dictionaries. Brief for Pet'r at 16. The point is disingenuous. Each dictionary cited by General Dynamics lists as a principal definition of "age" that is

interpretation relies upon Petitioner's further construction of the terms "older workers" and "older persons," which appear in the ADEA's "Statement of Findings and Purposes," section 2 of the Act, 29 U.S.C. §621, and upon extensive policy arguments. However, neither section 2 of the Act nor the parade of invidious consequences imagined by Petitioner can ultimately bear the weight Petitioner would place upon them in its effort to rewrite the statute.

Petitioner's reliance on section 2 of the Act, Congress' "Statement of Findings and Purposes," is misplaced. First, assume *arguendo* that section 2 is inconsistent with either sections 4(a)(1) or 12(a) of the ADEA. Applying the ordinary canons of statutory construction resolves the inconsistency. The language of section 2 is, as the Sixth Circuit noted, hortatory and non-binding and is thus entitled to less weight than both the operative language of the ADEA's nondiscrimination mandate in section 4(a)(1) and the age limitation in section 12(a). This Court has consistently refused to read statements of findings and purposes to modify the operative provisions of a statute. *See, e.g., Pa. Dep't of*

---

consistent with the lower court's understanding that the word means chronological age. In contrast, Petitioner's suggested alternative definitions are all secondary or tertiary definitions. *See Webster's Third New International Dictionary* 40 (1993); *Random House Unabridged Dictionary* 37 (2d ed. 1993); *American Heritage Dictionary of the English Language* 32 (4th ed. 2000); *The Compact Oxford English Dictionary* 28 (2d ed. 1999); *The New Lexicon Webster's Dictionary of the English Language* 15 (1987); *Encarta World English Dictionary* 29 (1999). Petitioner's claim that the word "age" is ambiguous would, taken to its logical conclusion, make any plain meaning reading of a statute impossible. If "age" is ambiguous then every other word in the English language is ambiguous.

Corr. v. Yeskey, 524 U.S. 206, 220 (1998); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994).

Second, the reference to "older workers" and "older persons" in section 2 is generalized, while section 12(a) specifically defines "individuals who are at least 40 years of age" as the persons entitled to the protection of the Act. The more specific language in a statute controls the more general. *See, e.g., Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996). Thus, in the event of inconsistency, the traditional canons of statutory interpretation require that section 2 of the ADEA be subordinated to sections 4(a)(1) and 12(a).

Third, Petitioner's reliance on section 2 is misplaced because, as the Sixth Circuit held, there is no inherent inconsistency between these provisions. Inconsistency is avoided by reading section 12(a) to define section 2. Section 12(a) defines the class of "older workers" that Congress expressed its intention to protect in section 2 as those individuals who are at least forty years of age. This interpretation is reasonable, does not produce absurd results, and easily resolves any purported inconsistencies between section 2 and the operative text of the Act.

29 U.S.C. §623(i) also supports the plain-meaning interpretation of the ADEA. In section 623(i), Congress permitted employers to utilize a fractional pension accrual method that would entitle a worker hired at age fifty to larger pension contributions from their employer than a worker hired at age forty. It appears Congress recognized that such favorable treatment of older workers would otherwise be considered discriminatory and chose to expressly authorize that practice in section 623(i). If General Dynamics' interpretation of the ADEA is accepted, then section 623(i) would be superfluous. "A statute should be construed so that

effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ... ." *See*, Norman J. Singer, 2A STATUES AND STATUTORY CONSTRUCTION §46:06 (6th ed. 2000).

B. The CBA2 Clearly Discriminates on the Basis of Age.

Petitioner's single-minded focus on the meaning of the term "age" in section 4(a)(1) of the ADEA overlooks a second issue of equal importance. For this Court to interpret and apply section 4(a)(1), it must also consider the meaning of the phrase - "to ... otherwise discriminate."

Used in its broadest sense, which can encompass affirmative action, consent decrees and redistricting, the question of what constitutes unlawful "discrimination" has given rise to difficult and divisive cases for this Court in both constitutional[3] and statutory[4] contexts. However, this case presents a narrower inquiry. To ascertain the meaning of the term "discriminate" in section 4(a) of the ADEA, this Court has looked to cases interpreting that same term in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. "[I]nterpretation[s] of Title VII ... appl[y] with equal force in the context of age discrimination, for the substantive

---

[3] *See, e.g., Gratz v. Bollinger*, 123 S.Ct. 2411 (2003) (undergraduate admissions program that assigns fixed points based on race violates equal protection clause); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (law school admissions program upheld as narrowly tailored to further compelling interest in diversity).

[4] *See, e.g., Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding voluntary affirmative action plan against a Title VII challenge).

provisions of the ADEA 'were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (*quoting Lorillard v. Pons*, 434 U.S. 575, 584 (1978)). Although this Court has not yet determined whether certain aspects of the proof process in Title VII cases are applicable to cases brought under the ADEA,[5] there is no reason to differentiate between the two statutes when an employer adopts a policy that expressly classifies employees based upon a protected trait.

Employers "discriminate" within the meaning of Title VII when they meet out differential treatment, whether favorable or otherwise, based upon a statutorily protected characteristic. *See, e.g., McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976). Under Title VII, a finding of sex discrimination results when an employee is treated "in a manner which but for that person's sex would be different." *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978). Proof of discrimination generally requires a showing that similarly situated persons have received different treatment because of a statutorily protected characteristic. *See, e.g.*,

---

[5] *Compare Reeves v. Sanderson Plumbing Prod, Inc.*, 530 U.S. 133, 142 (2000) (assuming *arguendo*, that the *McDonnell Douglas* framework used in Title VII cases is applicable to ADEA disputes) *with Consolidated Coin* (modifying the *McDonnell Douglas* framework for use in ADEA cases but noting that its application was "assumed" because the parties failed to contest it). It is also uncertain whether disparate impact analysis is available in ADEA disputes. *See, e.g., Adams v. Fla. Power Corp.*, 534 U.S. 1054 (2001) (dismissing as improvidently granted a case that raised the question whether disparate impact analysis applied to the ADEA); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here.").

Newport News Shipbldg & Dry Dock Co. v. EEOC, 462 U.S. 669, 683 (1983).

The decisions of this Court interpreting the term "discriminate" as it is used in Title VII and the ADEA comport with dictionary definitions of the term. The latter sources provide that to "discriminate" means to "distinguish" or "differentiate" or to make a "distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit." *See Random House Dictionary* 564 (2d ed. 1987); *see also Webster's Third New International Dictionary* 648 (1981) (defining "discrimination" as "the making or perceiving of a distinction or difference" or as "the act, practice, or an instance of discriminating categorically rather than individually.")

Applying both the statutorily-derived and dictionary-based meanings of the term "discriminate," there can be no doubt that General Dynamics has engaged in overt, express, and intentional discrimination. CBA2 provides in clear terms that Respondents will *never* be eligible for retiree health benefits solely because they were less than age fifty on July 1, 1997.[6]

---

[6] This fact also differentiates Respondents from the plaintiffs in *Hamilton*. There, the employer was closing two plants and decided to offer early retirement incentives to certain older workers. The early retirement incentives at issue in *Hamilton* were supplemental benefits, and no workers were excluded from benefits they had previously been entitled to receive. Moreover, according to the district court in *Hamilton*, the incentive plan amounted to a bona fide employee benefit plan and thus would have been protected by section 4(f)(2) of the ADEA, 29 U.S.C. §623(f)(2). The Seventh Circuit chose not to decide that issue. Accordingly, it appears that the incentive plan in *Hamilton* was protected by an affirmative

General Dynamics has singled Respondents out for differential treatment because of their age, which is the statutorily protected characteristic under the ADEA. General Dynamics has chosen to treat the Respondents categorically (as a group of persons who were less than age fifty on July 1, 1997) rather than individually, and this difference in treatment is based upon a protected trait.

Under these conditions, age is transformed into an immutable characteristic and is functionally indistinguishable from sex, race, color, or national origin.[7] Age becomes not merely beyond a worker's control (as it always is), but also fixed, just as a snapshot photo freezes a moment in time. Used in this manner, age bears no relationship to job performance. This is precisely the sort of arbitrary age classification that Congress sought to eliminate by enacting the ADEA. *See* "Statement of Findings and Purposes," section 2(a)(2), 29 U.S.C. §621(a)(2) ("the setting of arbitrary age limits... may work to the disadvantage of older persons") and section 2(b), 29 U.S.C. §621(b) ("It is therefore the purpose of this chapter ... to prohibit arbitrary age discrimination in employment....").

---

statutory defense, and the Seventh Circuit could have ruled in favor of the employer without reaching the question of "reverse age discrimination."

[7] Ordinarily, as the Seventh Circuit observed in *Hamilton*, age does not have the characteristics of immutability. *See*, *Hamilton*, 966 F.2d at 1227 ("Age is not a distinction that arises at birth. Nor is age immutable. . . ."). However, "snapshot" classifications operate in such a way as to convert age into the functional equivalent of an immutable criterion.

Petitioner attempts to avoid the plain meaning of the ADEA by terming the Employees' claims as those of "reverse discrimination." Brief for Pet'r at i. As Judge Ryan recognized in his opinion for the Sixth Circuit opinion below, "the expression 'reverse discrimination'" is a misnomer. *See Id.* at 9a. Judge Ryan explained that "the fact that some members within the protected class were beneficiaries of the discriminatory action . . . does not somehow suspend the language of the statute . . . ." *Id.* at 10a. Because the Employees are at least forty years of age or older, they are within the protected class. General Dynamics' decision to rescind their retirement health care benefits because of the Employees' ages violates the ADEA. This Court should give effect to the clearly expressed intent of Congress and hold that the ADEA protects all persons age forty and over from arbitrary age discrimination.

II. THE PLAIN-MEANING INTERPRETATION OF THE ADEA IS SUPPORTED BY THE PARALLEL STRUCTURE OF OTHER NONDISCRIMINATION LAWS.

General Dynamics contends that if this Court adopts the plain-meaning interpretation of the ADEA, the outcome will be aberrational and anomalous, and Petitioner attempts to distinguish cases arising under Title VII. Brief for Pet'r at 20-21. In fact, the Title VII cases are clearly analogous here and provide further support for the plain-meaning interpretation of the ADEA adopted by the Sixth Circuit.

For example, *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75 (1998), held that men were entitled to sue under Title VII for same-sex sexual harassment. This was not characterized as a "reverse discrimination" case, nor was it problematic that Congress undoubtedly was not concerned

with male-on-male sexual harassment in the workplace when it enacted Title VII. As this Court stated: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79.

Similarly, *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976) made clear that white persons could bring actions for race discrimination under Title VII. Again, the evil to be remedied in that case was understood to be an employer's action that was based upon the prohibited criterion. It did not matter that Congress was not contemplating discrimination against white persons when it enacted Title VII. This Court applied the plain language of the statute and determined that Title VII protects white persons when an employer singles them out for different treatment because of their race.

Most recently, in *Nev. Dep't of Human Res. v. Hibbs*, 123 S.Ct. 1972 (2003), this Court recognized the right of a man to sue for family leave to care for his ailing wife under the Family and Medical Leave Act of 1993 ("FMLA"). The Court acknowledged that a primary purpose of the FMLA was to remedy sexual stereotyping in the workplace and counter widely-held beliefs that women should carry a heavier share of family duties. *Id.* at 1975. Once again, *Hibbs* was neither framed nor understood as a case of "reverse discrimination." *Hibbs* was a case where the employee fell within the protected class and was thus entitled by the statute to time off from work to care for a family member.

In each of these cases, this Court has recognized that when Congress chooses to protect a particular characteristic (such as race, sex or age) and prohibits employers from acting on

that basis, then any person who is covered by the statute has a right of action when the employer so acts. All persons can sue for race and sex discrimination when they are singled out for adverse treatment on those grounds, and all persons age forty and over have a *prima facie* claim of age discrimination when a covered employer withholds benefits on the basis of age. An employer may raise affirmative defenses to such claims, but the essential element of the claim is the assertion that the employer has treated the claimant differently because of the protected trait.

Disability discrimination under the Americans with Disabilities Act ("ADA") operates somewhat differently. Under the ADA, only claimants who meet the statutory definition of "otherwise qualified individuals with a disability" have standing to sue. *See* 42 U.S.C. §12111(8); 29 U.S.C. §706(7). Thus, persons who are not disabled could not sue a "Helping Hands" workshop for refusal to hire them, because they do not fall within the protected class. This limitation in the ADA suggests that Congress knows how to draft a discrimination statute to limit reverse discrimination that Congress deems undesirable. Moreover, it demonstrates that Congress limits reverse discrimination when such limitations are deemed appropriate.

Congress limited the class of persons eligible to bring ADEA actions in section 12(a), which confines the protections of the Act to persons age forty and over. In so doing, Congress precluded persons under age forty from bringing an action for age discrimination,[8] just as it excluded nondisabled

---

[8] Petitioner's curious decision to characterize discrimination against employees between the ages of forty and fifty as "youth discrimination" would be humorous if it were not so inappropriate. Congress has determined that members of the work force over the

persons from bringing suit under the ADA. However, Congress did not take the further step that Petitioner urges upon this Court of restricting the ADEA's protection to persons within the protected age group who are treated less favorably than younger workers. Nor did Congress envision the perverse outcome that General Dynamics advocates, where the ADEA would create an escalator of protections as individuals age, with relatively older employees receiving more protection against discrimination than younger employees who are within the protected age group. In short, the structure and operation of other nondiscrimination statutes reinforces the plain-meaning interpretation of the ADEA. This Court should interpret the ADEA consistently with the other federal nondiscrimination statutes by affirming the Sixth Circuit.

III. 29 C.F.R. §1625.2 CONFIRMS THE PLAIN-MEANING INTERPRETATION OF THE ADEA AND IS ENTITLED TO *CHEVRON* DEFERENCE.

A. 29 C.F.R. §1625.2 is Clear and Accords With the Plain Meaning of the ADEA.

As noted previously, Respondents contend that the plain meaning of the operative provisions of the ADEA, contained in sections 4(a) and 12(a), speak directly to the question presented and are unambiguous. However, were this Court

---

age of forty are entitled to protection from arbitrary discrimination on account of their age. No re-characterization of them as youths can change that fact. Congress was well aware of the plight of middle aged workers when they determined the parameters of the protected age group and protected them from actions like those of the Petitioner. S. Rep. No. 90-723 (1967).

to determine that Congress has not directly addressed the issue of discrimination between persons in the protected age group, then this Court should defer to the reasonable interpretation of the agency charged with the duty to interpret and apply the ADEA, the Equal Employment Opportunity Commission (the "EEOC" or the "Commission"). As this Court held in *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984):

> The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-844. (Citations and footnotes omitted).

The EEOC has squarely addressed the issue of discrimination between members of the protected age group. The Commission has issued a regulation pursuant to notice-and-comment rulemaking procedures, and its regulation confirms that the plain-meaning interpretation of the ADEA is correct. The Commission's regulation provides as follows:

Discrimination between individuals protected by the Act.

(a) It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other is 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

(b) The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.

29 C.F.R. §1625.2.[9]

Petitioner unsuccessfully attempts to characterize this regulation as ambiguous, unpersuasive, and non-binding.

---

[9] This regulation has been applied in two EEOC opinions, both of which confirm the plain-meaning interpretation of the ADEA. *See, e.g. Garrett v. Runyon*, 1997 WL 574739 (EEOC Sept. 5, 1997) (holding that while a tie-breaker provision in collective bargaining agreement benefited older employees, 1625.2 provides protection from age discrimination to both the older and younger individuals who fall within the ambit of the ADEA); *Garrett v. Henderson*, 1999 WL 909980 (Sept. 30, 1999) (reaffirming previous decision over request for reconsideration).

Brief for Pet'r at 38-40. It is none of those things. The regulation is a clear and internally consistent explanation of the Commission's interpretation of the ADEA, and it is entitled to *Chevron* deference.

The regulation is not ambiguous. It clearly states that when an employer must choose between individuals, each of whom is within the protected age group, the employer cannot use age to distinguish between them. The regulation confirms that individuals over the age of forty are protected from age discrimination without regard to their relative ages.

Petitioner's suggestion that section 1625.2 merely means that the employer should not treat the advanced age of either employee as a negative factor is unpersuasive. The regulation frames the issue as requiring a choice between the employees in the protected age group - a decision to prefer one over the other. Section 1625.2 makes clear that the employer cannot base its decision upon age when allocating benefits or burdens between persons in the protected age group. Yet this is precisely what General Dynamics has done in CBA2. General Dynamics has permitted workers age fifty and over on July 1, 1997 to retain their eligibility for retirement health benefits and has eliminated Respondents' eligibility for such benefits solely because of their age. CBA2 clearly evinces age discrimination within the protected age group, which is expressly prohibited by the EEOC's regulation.

Moreover, section 1625.2(b) does not conflict with section 1625.2(a) as General Dynamics suggests. Brief for Pet'r at 39. Subsection (b) permits the employer to extend additional benefits to persons within the protected age group, but only if the employer "has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination." 29 C.F.R. §1625.2(b). Petitioner has

offered painfully little by way of factual proof or argument on this point and is not in a position to do so because of the procedural posture of this case. General Dynamics suggests that older workers need favorable treatment in benefit plans because they have fewer working years to recover from changes or that they should be "grandfathered" into retirement benefits on which they have relied. Brief for Pet'r at 42. However, neither argument is sufficient to bring their conduct within the ambit of section 1625.2(b).

First, section 1625.2(b) authorizes only the extension of *additional* benefits to older employees. It does not authorize the withdrawal or elimination of benefits from persons within the protected age group. Thus, the limited grant of flexibility to employers that section 1625.2(b) provides is simply not applicable here. General Dynamics cannot withdraw benefits from one group of protected employees and attempt to characterize that withdrawal as the extension of additional benefits to those not so excluded.

Petitioner's argument distorts the ordinary meaning of "additional." "Additional" means "existing or coming by way of addition." *Webster's Third New International Dictionary* 24 (1981). "Addition" means "something added," and its idiomatic equivalents are "over and above; besides." *American Heritage Dictionary 20* (3d ed. 1992). General Dynamics has not provided additional benefits to any subset of workers within the protected age group. Rather, the company has eliminated benefits from workers within the protected age group. Accordingly, section 1625.2(b) does not authorize CBA2.

Second, although it is true as a factual matter that an employer's oldest workers generally have fewer working years to recover from changes in their benefits, this truism

does not give General Dynamics a "reasonable basis" to assert that the provisions of CBA2 were intended to counteract problems associated with age discrimination. General Dynamics candidly concedes that the reason for imposing age-based criteria is "obvious. Retiree health insurance is extraordinarily expensive." Brief for Pet'r at 41. If General Dynamics adopted these age-based criteria as a cost-cutting measure, it cannot credibly assert at this juncture that it intended CBA2 as a means to combat "problems associated with age discrimination." Even if this contention were credited, it remains clear that CBA2 does not involve the extension of additional benefits and is thus not authorized by section 1625.2(b).

Third, the last sentence of section 1625.2(b) provides that the extension of additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act. This language reinforces two points: subsection (b) contemplates only the extension of *additional* benefits, not the withdrawal or elimination of benefits, and even the extension of additional benefits must not violate the substantive terms of the Act. In short, section 1625.2 has none of the flaws that Petitioner claims. Section 1625.2(b) is clear, unambiguous, directly on point, and reflects the consistently expressed views of the Commission. Section 1625.2 accords with the plain meaning of the ADEA and should be afforded *Chevron* deference.

B. 29 C.F.R. §1625.2 is Entitled to *Chevron* Deference.

The degree of deference that courts extend to agency regulations turns on four factors: (1) the scope of the rulemaking power afforded to the agency by Congress, (2) the use of notice-and-comment rulemaking procedures, (3)

whether that interpretive authority has been split between multiple agencies, and (4) whether or not the agency's regulation is based on a permissible or reasonable construction of the statute. Respondents will demonstrate that each of these factors militates in favor of full *Chevron* deference.[10]

First, Congress has extended broad rulemaking authority to the Commission with respect to the ADEA:

> **Rules and Regulations; exemptions.**
>
> In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.[11]

---

[10] However, even if this Court chooses to apply the lower standard of deference set forth in *Skidmore v. Swift*, 323 U.S. 134 (1944), Respondents contend that section 1625.2 is highly persuasive and should be followed.

[11] The original grant of rulemaking power was given to the Secretary of Labor. The EEOC was substituted pursuant to Reorg. Plan No. 1 of 1978, §2, 43 Fed .Reg. 19,807 (May 9, 1978), 92 Stat. 3781, set out in App. 1 to Title 5, Government Organization and Employees, which transferred all functions vested by this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by section 1-101 of Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978).

29 U.S.C. §628.

This grant of rulemaking authority over the ADEA is more expansive than the limited grant of rulemaking authority Congress provided the EEOC with respect to Title VII. *Compare*, §713(a) of Title VII, 42 U.S.C. §2000-12(a) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter."). The expansive terms of this grant indicate that Congress intended the EEOC to have the broadest possible range of rulemaking authority with respect to the ADEA.

Second, the EEOC engaged in notice-and-comment rulemaking when it enacted section 1625.2. These regulations were proposed in 1979, *see* 44 Fed. Reg. 68,860 (Nov. 30, 1979), and adopted in 1981.[12] In fact, some changes in the regulation's language resulted from the notice-and-comment process.[13] Notice-and-comment rulemaking is a significant factor suggesting that *Chevron* deference is warranted. *United States v. Mead*, 533 U.S. 218, 227-228 (2001).

Third, interpretive power over the ADEA is not split between multiple agencies but resides exclusively with the Commission. 29 U.S.C. §628. This singular grant of rulemaking authority eliminates the possibility of confusion that exists when multiple agencies are given interpretive authority and conflict may arise between them. *See, e.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (refusing to apply *Chevron* deference where interpretive

---

[12] *See*, 46 Fed. Reg. 47,726 (Sept. 29, 1981).

[13] The Commission explained in 46 Fed. Reg. 47,726 (Sept. 29, 1981) that it was making changes in response to public comments.

authority for the ADA was split between three agencies, none of whom had authority to interpret the term "disability" because it fell outside Titles I-V); *Skidmore v. Swift*, 323 U.S. 134 (1944) (where Administrator not clearly authorized to interpret Fair Labor Standards Act, his interpretive bulletins and informal rulings are not entitled to *Chevron* deference). When interpretive authority is not split between multiple agencies but resides in one clearly authoritative body, this Court generally applies *Chevron* deference. *See, e.g.*, *Chevron v. Echazabal*, 536 U.S. 73 (2002) (applying *Chevron* deference to EEOC regulation involving harm-to-self under the ADA); *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002) (upholding the EEOC's "relation back" regulation without specifying the degree of deference due); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (applying *Chevron* deference to administrative guidance issued by Justice Department); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988) (deferring to EEOC interpretation of Title VII).

Once *Chevron* deference is applied, there can be no question that section 1625.2 is relevant, reasonable, and should determine the outcome of this controversy. The regulation speaks directly to the question of discrimination between persons in the protected age group. It is unambiguous and explicit. The regulation prohibits an employer from using age as a basis to distinguish between persons within the protected age group, providing the lone exception for the extension of additional benefits, which is not applicable on these facts. In sum, in the event this Court looks beyond the operative language of sections 4(a) and 12(a) of the ADEA, this Court should defer to the Commission's reasonable resolution of this issue in section 1625.2. The EEOC's regulation thus provides this Court with an additional reason to affirm the decision of the Sixth Circuit.

Alternatively, under the standard set forth in *Skidmore v. Swift*, 323 U.S. 134 (1944), section 1625.2 should still be applied. *Skidmore* provides that:

> [T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistence with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

Although the delegation of interpretive authority was unclear in *Skidmore*, and the delegation in this case is both explicit and expansive, the teaching of *Skidmore* nonetheless requires that section 1625.2 be given substantial weight. As previously noted, this regulation was adopted pursuant to notice-and-comment rulemaking procedures, and the regulation was modified in response to public comments, serving to demonstrate the thoroughness of the EEOC's consideration of the issue. The validity of the EEOC's reasoning is evident, and the regulation is entirely consistent with the plain meaning of the substantive provisions of the ADEA. Finally, the regulation reflects the consistent view of the agency that Congress charged with responsibility to interpret the ADEA. Thus, even under the less deferential standard of *Skidmore*, section 1625.2 is directly applicable to this controversy, and this Court should afford it substantial weight.

IV. AN EEOC POLICY STATEMENT CONFIRMS THE PLAIN-MEANING INTERPRETATION OF THE ADEA AND IS ENTITLED TO *SKIDMORE* RESPECT.

The Policy Statement issued by the Chairman of the EEOC on June 30, 1988, further demonstrates the consistency of the EEOC's view on the issue of discrimination between persons in the protected age group. *See Cases Involving the Extension of Additional Benefits to Older Workers* (EEOC Policy Guidance, N-915.029, June 1988). The pertinent portion of this policy statement quotes the full text of section 1625.2, and proceeds to explain that regulation as follows:

> The (a) subsection of this interpretation sets forth the general rule against discrimination based on age within the protected age bracket or group. This is basically a reiteration of ADEA's sec. 4(a) prohibition with specific emphasis on the fact that discrimination on the basis of age is generally unlawful even between individuals who are within the Protected Age Group (PAG).

Id. at 2.

The letter then offers two examples of circumstances where an employer can legally provide additional benefits to older workers - severance pay following a non-discriminatory reduction in force, and subsidized preretirement survivor annuity coverage to employees who are eligible for early or normal retirement. Neither of these very specific exceptions helps General Dynamics. As previously noted, CBA2 did not provide additional benefits to older employees; instead, it withdrew benefits from employees within the protected age group.

This Court generally applies *Skidmore* to policy statements issued in the EEOC Compliance Manual. *See, e.g., Nat'l RR Pass. Corp. v. Abner Morgan, Jr.*, 536 U.S. 101, 110 n.6 (2002) (applying *Skidmore* to EEOC interpretive guidelines in Compliance Manual); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (applying *Skidmore* to policy statements in the EEOC Compliance Manual, a letter from the general counsel, and testimony by the EEOC Chairman regarding the extraterritorial application of Title VII).

Applying the *Skidmore* test, this policy statement should be deemed persuasive. It is consistent with the EEOC's interpretation of the Act in section 1625.2, the reasoning of the policy statement is valid, and it provides additional evidence of the EEOC's strong commitment to protecting all members of the protected age group from unlawful discrimination based on their age. This policy confirms the plain-meaning interpretation of the ADEA and offers yet another reason to affirm the decision of the Sixth Circuit.

V. THIS COURT'S DECISION IN *CONSOLIDATED COIN* IS CONSISTENT WITH THE PLAIN MEANING OF THE ADEA.

In *Consolidated*, this Court modified the framework established by *McDonnell Douglas*, to ensure that it would function effectively in cases alleging age discrimination. The Court held that it was unnecessary for an ADEA plaintiff to show that he or she had been replaced by someone outside the protected age group (namely under the age of forty). *Consolidated Coin*, 517 U.S. at 312. The Court determined that an inference of unlawful age discrimination could be drawn where the plaintiff was replaced by someone "substantially younger." *Id.* at 313.

In *Consolidated Coin*, there was no direct evidence that the age of the plaintiff "actually motivated the employer's decision" as required by *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993) ("liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."). Accordingly, the plaintiff in *Consolidated Coin* had to prove inferentially the employer's intent to discriminate on the basis of age. Here, the Employees have no need to prove that General Dynamics' decision was based on their ages because CBA2 expressly excludes employees who are younger than fifty on July 1, 1997, from eligibility for retirement health benefits.

Consolidated Coin suggests that there is a weak inference of an employer's intent to discriminate on the basis of age where there is an insignificant age difference between the plaintiff and the replacement employee, even where the replacement is under forty years of age. 517 U.S. at 312. However, that case did not involve a situation where the plaintiff was younger than the individual who replaced him. Thus, the Court did not reach the issue presented here.

Finally, the harm suffered by the Employees in this case derives from a facially discriminatory CBA2 that expressly classifies workers based upon their age. This case thus involves a matter of arbitrary age discrimination, rather than one involving either age-based animus or prejudicial stereotyping. Congress specifically identified "arbitrary age limits" and "arbitrary age discrimination" as harms that the ADEA was intended to redress. *See* 29 U.S.C. §621 (a)(2), (b).

VI. CONSIDERATION OF SECTION 4(F)(2)(B)(I) IS NOT POSSIBLE ON THE PRESENT RECORD.

Petitioner has invoked section 4(f)(2)(B)(i), 29 U.S.C. §623(f)(2)(B)(i), which was added to the ADEA by the Older Workers Benefit Protection Act of 1990, P.L. 101-433, §103, 104 Stat. 978, 978-979 (1990)("OWBPA"). This provision modified the previous section 4(f)(2) exemption for bona fide employee benefit plans and was intended to overrule the Supreme Court's decision in *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989). Petitioner (and the AFL-CIO, in its brief *amicus curiae*), contends that this section provides an independent basis for reversing the decision of the United States Court of Appeals for the Sixth Circuit. However, this issue is not properly before the Supreme Court.

This matter came before the district court on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). It is well settled that a 12(b)(6) motion is limited to the pleadings in the case. In ruling on a 12(b)(6) motion, the court presumes that all well-pleaded allegations are true, resolves all doubts and inferences in the pleader's favor, and views the pleadings in the light most favorable to the non-moving party. *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 267 (1994); *United States v. Gaubert*, 499 U.S. 315, 327 (1991); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the court may take judicial notice. *See* James Wm. Moore *et al.*, 2 MOORE'S FEDERAL PRACTICE §12.34[2] (3rd ed. 2000); Charles Alan Wright, *et al.*, 5A FEDERAL PRACTICE AND PROCEDURE, §1277 at 464 (2d ed. 1986). General Dynamics 12(b)(6)

motion responds directly to the complaint. It takes into account no evidence or exhibits outside the pleadings.

Further, the burden of proof needed to demonstrate that a benefit differential falls within section 4(f)(2)(B)(i) rests on General Dynamics. The Act explicitly and unequivocally states that the employer bears the burden of showing that any benefit differential is justified by significant cost considerations. "An employer ... shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter ... ." 29 U.S.C. §623(f)(2)(B). *See also*, 29 C.F.R. §1625.10. In effect, Congress has ensured that section 4(f)(2)(B)(i) must be treated as an affirmative defense. General Dynamics has not presented and cannot present any evidence in support of this affirmative defense.

Moreover, as an affirmative defense that depends upon the proof of facts outside the pleadings, section 4(f)(2)(B)(i) has not been argued below. This was Petitioner's litigation strategy. Petitioner cannot now attempt to raise and argue an issue that it chose not to present to the courts below.

The Employees filed their initial complaint on June 24, 1999, and an amended complaint on September 29, 1999. General Dynamics' motion to dismiss under Fed. R. Civ. P. 12(b)(6) was submitted in lieu of an answer to the amended complaint. General Dynamics' motion to dismiss relied exclusively on its theory that so-called "reverse discrimination" claims are not proper under the ADEA. Pet. App. 21a-25a. The district court granted the motion to dismiss, and Respondents appealed to the Sixth Circuit. The Sixth Circuit reversed the district court, and General Dynamics then filed an answer invoking section 4(f)(2)(B)(i) as an affirmative defense.

Because Petitioner did not raise section 4(f)(2)(B)(i) until after the Sixth Circuit's ruling, that defense was not before either the district court or the court of appeals as a possible ground for judgment. As neither the district court nor the court of appeals have had an opportunity to consider the section 4(f)(2)(B)(i) defense, it is not properly before the Supreme Court. This Court consistently refuses to hear issues that were not raised or addressed below. *See, e.g., Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115, n.5 (1998); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 n.2 (1989); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988); *Youngberg v. Romeo*, 457 U.S. 307, 317 n.19; *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Additionally, this issue goes beyond the Question Presented in the petition for certiorari, and this Court does not address issues that lie outside the scope of the Question Presented. *See, e.g., Matsushida Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). Whether the provisions of CBA2 are consistent with the bona fide employee benefit plan exemption established by section 4(f)(2)(B)(i) plainly exceeds the bounds of the Question Presented. As framed by Petitioner, the Question Presented for *certiorari* is:

> Whether the Court of Appeals erred in holding, contrary to decisions of the First and Seventh Circuits, that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634, prohibits "reverse discrimination," i.e. employer actions, practices, or policies that treat older workers more favorably than younger workers who are at least forty years old."

Brief for Pet'r at i. Petitioner cannot bring the entire text of the ADEA before this Court by means of an inclusive-numbers citation.

Finally, one subgroup of the Employees (the "Babb group") consists of ten General Dynamics' workers who retired prior to July 1, 1997, to ensure their receipt of retirement health benefits under CBA1. Respondents contend that this retirement was involuntary and amounted to a constructive discharge. While the merits of this claim await the completion of discovery and the development of a record, it must be noted that the last paragraph of the section 4(f)(2)(B) exemption specifically provides that "no such employee benefit plan shall require or permit the involuntary retirement of any individual because of the age of such individual." Because Respondents contend that CBA2 forced at least some members of the plaintiff class into an involuntary retirement, and there is no record to enable this Court to resolve that issue, it would be premature for this Court to hold that the section 4(f)(2)(B)(i) exemption immunizes General Dynamics from ADEA liability. At least with respect to the Babb group, the section 4(f)(2)(B)(i) defense is unripe for judicial resolution by this Court.

For these reasons, the section 4(f)(2)(B)(i) defense does not provide an independent basis for reversing the decision of the United States Court of Appeals for the Sixth Circuit.

VII. THE PLAIN-MEANING INTERPRETATION OF THE ADEA WILL NEITHER DISRUPT SETTLED EXPECTATIONS NOR PROSCRIBE WIDESPREAD EMPLOYMENT PRACTICES.

Petitioners (and several *amici*) would have this Court believe that the consequences of affirming the Sixth Circuit

are so egregious as to make that option untenable. In fact, the consequences of affirmance would be far less dramatic and wide-ranging than Petitioners contend.

The ADEA contains a significant number of affirmative defenses that are likely to immunize a wide range of common employment practices. The first of these defenses is 29 U.S.C. § 623(f)(1), which immunizes any decision based upon a reasonable factor other than age ("RFOA"). This defense would enable an employer to condition eligibility for certain benefits on length of service, seniority, or any factor other than age. This Court's decision in *Hazen Paper* confirms that employers may utilize criteria having some correlation to age without triggering ADEA liability. 29 U.S.C. § 623(f)(1) also establishes the bona fide occupational qualification defense ("BFOQ"), which enables employers to set age-based classifications that are relevant to job performance. While these defenses have no bearing in the present case, the BFOQ defense would be available to an employer in one of the cases cited by Petitioner - *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996). In that case, the U.S. Marshals Service utilized an age-based sliding scale in conjunction with physical fitness standards for promotion decisions. Non-federal employers wishing to engage in similar practices could invoke the BFOQ defense.

Other defenses to ADEA liability include 29 U.S.C. § 623(f)(2)(A), which establishes the bona fide seniority system defense, 29 U.S.C. § 623(f)(2)(B), which immunizes bona fide employee benefit plans, and § 623(l)(1)(A), which permits the use of attainment goals in early retirement incentive plans (commonly known as "ERIP's"). If one looks to the studies cited by Petitioner, (*See*, Brief for Pet'r at 41) it appears that most employers utilize "attainment goals" to establish eligibility for retiree health benefits, rather than the

"snapshot" approach General Dynamics has taken. Accordingly, most of the employment practices General Dynamics cited would be protected by one or more affirmative defenses and would not be undermined by the plain-meaning interpretation of the ADEA.

Indeed, attainment goals present few of the difficulties associated with "snapshot" age classifications. Attainment goals provide employees with an opportunity to qualify for benefits as they age and reflect the typical judicial understanding of age as a fluid and transitory process experienced by all workers. "Snapshot" classifications, however, take a picture of the age of the workforce at a moment in time and thus effectively convert age into an immutable characteristic. When employers restrict benefits based on a "snapshot," age becomes a fixed attribute that for purposes of the employer's classification will never change. Thus, all General Dynamics employees who failed to qualify for retiree health benefits at the time CBA2 went into effect will be perpetually barred from such benefits. It is not surprising, then, that Congress chose to single out attainment classifications and immunize employers who utilized them from ADEA liability.

Finally, most of the concerns raised by the *amicus* brief submitted by the ERISA Industry Committee involve conflicts that will supposedly arise if practices authorized by ERISA are thought to be prohibited by the ADEA. The bulk of these concerns are illusory and would be resolved by the principle of statutory construction holding that conflicting statutes should be interpreted to allow a later enacted, more specific statute to amend an earlier, more general statute to cure any repugnancy between the two laws. *See*, *e.g.*, *Smith v. Robinson*, 468 U.S. 992 (1984); *Watt v. Ala.*, 451 U.S. 259, 267 (1981); *Radzanower v. Touche Ross & Co.*, 426 U.S.

148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The ADEA was enacted in 1967; ERISA was enacted in 1974. Other decisions suggest that a more specific statute will be given precedence over a more general one without regard to their temporal sequence. *See, e.g., Busic v. United States*, 446 U.S. 398, 406 (1980); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). Under either maxim, the later, more specific provisions of ERISA authorizing a particular employment practice would trump the earlier, more general nondiscrimination mandate of the ADEA.

The ERISA *amicus* also raises concerns about practices authorized by the Internal Revenue Code. *See*, Brief of Amicus Curiae ERISA Industry Comm. at 5-10, 16-18. Again, the familiar principle that the more specific statute controls the more general would appear to resolve the legality of many, if not all, of these practices. In fact, the only instances of plans cited by this *amicus* whose terms would be called into question by an affirmance appear to be those that provide advantageous benefits to older workers in the absence of express congressional provisions authorizing such treatment. These might include target benefit pension plans, age-weighted defined contribution plans, and fractional accrual defined benefit plans. Some of these plans may be protected under section 623(f)(2)(B) as bona fide employee benefit plans. Indeed, as described by *amicus*, some of these plans appear to be supported by age-related cost justifications, which are set forth in the regulations promulgated pursuant to section 623(f)(2)(B) and which were incorporated into the text of that exemption by OWBPA. *See generally*, 29 C.F.R. §1625.10. Where age-related cost justifications can be proven, such plans would be permitted under 29 U.S.C. § 623(f)(2)(B).

VIII. THE DECISIONS OF THE LOWER FEDERAL COURTS ARE INAPPOSITE.

Petitioner relies upon some decisions of the lower federal courts in its effort to characterize the Sixth Circuit's decision below as aberrational. When these decisions are examined, it is clear that most rely without analysis upon *Hamilton* and *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988). Both *Hamilton* and *Schuler* are inapposite, because neither decision would be affected by this litigation's outcome.

In *Hamilton*, the employer and the union negotiated a special early retirement program in response to the anticipated closure of several plants. *Hamilton*, 966 F.2d at 1226-27. Early retirement benefits had previously been available only to workers sixty years of age and older. *Id.* at 1227. The new program was supplemental, and it extended the benefits of early retirement to workers age fifty and older. *Id.* Thus, the employer in *Hamilton* provided additional benefits to workers age fifty and older, based upon its perception that workers over fifty would have the most difficulty finding new employment after the plant closings. Applying the plain-meaning interpretation of the ADEA, this program is clearly permissible.

The program in *Hamilton* was a bona fide employee benefit plan under section 4(f)(2), and the district court held that the employer was entitled to summary judgment on that basis. *See Hamilton*, 966 F.2d at 1227. The district court also ruled that "reverse age discrimination" was not prohibited by the ADEA. *Id.* The Seventh Circuit chose to address only the latter issue. *Id.* Thus, the program in *Hamilton* is permitted by the ADEA, and the section 4(f)(2) defense provides a separate and independent basis for the

Seventh Circuit's holding. As discussed previously, this affirmative defense is not available to General Dynamics.

Respondents have shown that the section 4(f)(2) defense, as amended by OWBPA and presently codified at 29 U.S.C. § 623(f)(2)(B)(i), has been authoritatively interpreted by the EEOC to permit an employer to furnish additional benefits to older workers where such benefits are designed to counteract problems related to age discrimination. *See* 29 C.F.R. § 1625.2(b). This is precisely what the program in *Hamilton* accomplished. It extended additional benefits to older workers in recognition of the fact that employees over fifty years of age who lose their jobs because of a plant closing are likely to experience greater difficulties finding new employment than employees who are younger than fifty. Thus, the employer in *Hamilton* offered additional benefits to older workers (using the generally accepted meaning of "additional" benefits) and had a reasonable basis for concluding that the provision of such additional benefits would counteract problems related to age discrimination.

General Dynamics cannot make such a showing. While a full analysis of the section 4(f)(2) defense must await a remand and the development of a record, CBA2 does not comport with the requirements of 29 C.F.R. § 1625.2(b). The withdrawal of benefits is not equivalent to the conferral of additional benefits. Moreover, General Dynamics' decision to eliminate Respondents' eligibility for retirement health benefits was apparently a cost-saving measure. Brief for Pet'r at 41. The withdrawal of retirement health benefits cannot be said to *counteract* problems related to age discrimination – it *is* age discrimination. Because CBA2 does not counteract problems related to age discrimination and does not involve the conferral of additional benefits, it fails to satisfy the requirements of section 1625.2(b).

General Dynamics' reliance on *Schuler* is similarly misplaced. The employer in that case announced a company-wide reorganization involving a reduction in force of 400 workers. The employer announced a severance plan and encouraged certain workers to consider that severance plan. The plaintiff, whose position was eliminated by the reorganization, declined the severance plan and was then offered and declined another position with the same pay and benefits as his previous job. He then brought an action alleging age discrimination.

Schuler is inapposite because it is a case that turns on the employer's motivation. The severance plan at issue was age neutral, and there was no evidence that it was offered in a discriminatory manner. The severance plan tied benefits to seniority, which is permissible under *Hazen Paper*, as well as under 29 U.S.C. §623(f)(2)(A). However, the issue of affirmative defenses to the ADEA was not resolved because the plaintiff presented no evidence of age discrimination, whether direct or circumstantial. Because the plaintiff had not been replaced by a younger worker, the *McDonnell Douglas* framework did not support an inference of age discrimination. The plaintiff attempted to introduce statistical evidence regarding the ages of workers who had accepted the age-neutral severance plan, but he was unable to show a statistically significant pattern. Finally, the employer offered both a legitimate nondiscriminatory reason and a RFOA defense. The First Circuit concluded, with ample justification, that the plaintiff had failed to carry his burden of proving that the employer acted with the intent to discriminate on the basis of age.

Schuler simply has no relevance to this dispute. The present case involves a facially discriminatory policy, presents no issue of the employer's motivation, does not rely on

McDonnell Douglas, and involves no statistical proof or claim of disparate impact. The plan in *Schuler* was age neutral, and would probably have been entitled to the bona fide employee benefit plan defense. Respondents are confident that *Schuler* was correctly decided, and the outcome in *Schuler* would not change regardless of this Court's disposition of the instant controversy.

Petitioner also cites *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), *cert. denied*, 486 U.S. 1044. Yet, this too is inapposite. *Karlen* involved an early retirement plan that included complicated modifications of retiring employees' rights to receive different percentages of unused and accumulated sick leave and group health insurance upon retirement, depending upon the employee's age. *Id.* at 316-17. Differing benefits were available for the following age groups: 55-58, 59, 68-64, and 65-70, *Id.* at 316.

In reversing summary judgment for the employer's, Judge Posner held:

> Whether a worker takes early retirement because he fears he will be discriminated against on account of his age if he does not, or refuses to take early retirement and indeed is then discriminated against on account of his age, his rights under the Age Discrimination in Employment Act have been violated.

Id. at 317. Judge Posner explained:

> Nothing in the Age Discrimination in Employment Act forbids an employer to vary employee benefits according to the cost to the employer; and if, because older workers cost more, the result of the employer's

> economizing efforts is disadvantageous to older workers, that is simply how the cookie crumbles.
>
> But where, as in the present case, the employer uses age--not cost, or years of service, or salary--as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2). *See* 29 C.F.R. §1625.10(a)(1), (d)(1)-(3) (EEOC regulation interpreting section 4(f)(2)). Otherwise the inference of age discrimination will be strong--certainly strong enough to defeat a motion for summary judgment by the party having the burden of persuasion, that is, the defendant.

Id. at 319. Thus, according to the opinion in *Karlen*, with respect to discrimination within the protected age group, the employer must establish a basis other than age to justify different benefits.

Moreover, *Karlen* actually supports the subgroup of Respondents categorized as the "Babb Group." Like the other Respondents, these employees accumulated the necessary 30 years of seniority, were between 40-49, but retired from employment prior to CBA2's effective date to avoid losing their benefits. As stated in Judge Posner's opinion, "To withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed." *Id.* at 320.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

MARK W. BIGGERMAN
Counsel of Record
ERIN STOTTLEMYER GOLD
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
216/687-1311
216/687-1841-Fax

E. BRUCE HADDEN
HADDEN CO., L.P.A.
132 Northwoods Boulevard
Columbus, Ohio 43232
614/431-2000

JOANNE C. BRANT
KEVIN D. HILL
NANCY PAINE SABOL
OHIO NORTHERN UNIVERSITY
Pettit College of Law
Ada, Ohio 45810
419/772-2228
419/772-2227
419/772-2218

Supreme Court, U.S.
FILED
OCT 0 1 2003
OFFICE OF THE CLERK

16

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM J. KILBERG
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

DONALD B. VERRILLI, JR.
Counsel of Record
DEANNE E. MAYNARD
JARED O. FREEDMAN
MARTINA E. VANDENBERG
JENNER & BLOCK, LLC
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

October 3, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The ADEA's Text Prohibits Only Discrimination Based on Old Age 1

II. The United States' Invocation of the ADEA's Legislative History Fails 13

III. The Judgment Below Cannot Be Defended on the Basis of the EEOC's Interpretive Guideline 14

IV. The Interpretation Advanced By Respondents and the United States Would Inflict Serious Real-World Harms 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932) 9

Brown v. Gardner, 513 U.S. 115 (1994) 3, 16, 17

Burt v. Bentsen, No. 01942163, 1994 WL 735377 (E.E.O.C. Apr. 29, 1994) 15

Chevron U.S.A., Inc. v. Natural Resource Defense Council Inc., 467 U.S. 837 (1984) 16

Christensen v. Harris County, 529 U.S. 576 (2000) 18

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 13

Deal v. United States, 508 U.S. 129 (1993) 3, 17

DuPriest v. Bentsen, No. 01942145, 1994 WL 1755951 (E.E.O.C. May 2, 1994) 15

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 13

Garcia v. United States, 469 U.S. 70 (1984) 14

Garrett v. Runyon, No. 01960422, 1997 WL 574739 (E.E.O.C. Sept. 5, 1997), *aff'd sub nom. as modified, Garrett v. Henderson*, No. 01960422, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999) 18

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) ... 1, 2, 13

Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987) 11

Inyo County v. Paiute-Shoshone Indians, 123 S. Ct. 1887 (2003) 9

Isabella v. Runyon, No. 01944083, 1995 WL 653513 (E.E.O.C. Oct. 19, 1995) 15

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) 2

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 4

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) 20

Lorillard v. Pons, 434 U.S. 575 (1978) 13

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 12

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 13

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 12

Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2d Cir. 1987) 11

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 16

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 6, 9

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 18

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 4

Toyota Motor Manufacturing Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) 4

United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) 3

United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) 9

United States v. Mead Corp., 533 U.S. 218 (2001) 18

United States v. O'Brien, 391 U.S. 367 (1968) 14

Varity Corp. v. Howe, 516 U.S. 489 (1996) 9

Zuber v. Allen, 396 U.S. 168 (1969) 14

STATUTES AND REGULATIONS

5 U.S.C. § 553(d) 17

29 U.S.C. § 621 ..... 2, 3, 4

29 U.S.C. § 621(b) 8

29 U.S.C. § 623(a)(1) ..... *passim*

29 U.S.C. § 623(e) 8, 10

29 U.S.C. § 623(f) 10

29 U.S.C. § 623(f)(1) 8

29 U.S.C. § 623(f)(2) 2, 7

29 U.S.C. § 623(*l*) 7, 10

29 U.S.C. § 631(a) 4

29 C.F.R. § 860.1 (1969) 17

29 C.F.R. § 860.91 (1969) 17

29 C.F.R. § 1614.405 (1994) 15

29 C.F.R. § 1614.405 (1995) 15

29 C.F.R. § 1614.407 (1994) 15

29 C.F.R. § 1614.407 (1995) 15

29 C.F.R. § 1625 Subpart A 17

29 C.F.R. § 1625 Subpart B 17

29 C.F.R. § 1625.2 15

29 C.F.R. § 1625.2(b) 14

29 C.F.R. § 1625.7 17

43 Fed. Reg. 12661 (Mar. 23, 1979) 17

46 Fed. Reg. 47724 (Sept. 29, 1981) 16, 17

LEGISLATIVE MATERIAL

Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 2

S. Rep. No. 90-723 (1967) 14

H.R. Rep. No. 90-805 (1967) 14

H.R. Rep. No. 101-664 (1990) 11

MISCELLANEOUS

Letter WH-389, 1976 WL 41742 (June 25, 1976) 16, 18, 19, 20

Letter WH-404, 1976 WL 41753 (Aug. 26, 1976) 16

Letter WH-419, 1977 WL 53487 (July 1, 1977) 16, 20

Letter WH-451, 1978 WL 51448 (Jan. 31, 1978) 16

John F. Manning, *The* Absurdity *Doctrine,* 116 Harv. L. Rev. 2387 (2003) 3

Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965) 12

REPLY BRIEF FOR PETITIONER

"[T]he very essence of age discrimination" is disparate treatment based on the false assumption that "productivity and competence decline with *old age*." *Hazen Paper Co. v Biggins*, 507 U.S. 604, 610 (1993) (emphasis added). The Age Discrimination in Employment Act ("ADEA") forbids such disparate treatment of employees 40 or older. ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). Neither respondents nor the United States point to anything in the ADEA's language or structure, or in its policies or purposes, that justifies the counterintuitive conclusion that § 4(a)(1) should be extended to prohibit the disparate treatment of such employees based on their relative youth.

ARGUMENT

I. The ADEA's Text Prohibits Only Discrimination Based on Old Age.

1. There is no merit to the argument that the word "age" in § 4(a)(1) necessarily means "chronological age" – and cannot mean "old age" – and that § 4(a)(1) thus necessarily prohibits any disparate treatment based on the chronological age of employees 40 or older. "Old age" is (as demonstrated, *see* Pet. Br. 16-17), a natural meaning of the word "age." The mere fact that "chronological age" typically precedes "old age" or "advanced years" in dictionary definitions does not come close to justifying the conclusion that the "plain meaning" of § 4(a)(1) forbids disparate treatment of employees 40 or older on the ground that they are too young. Indeed, just as the language in § 4(a)(1) is best understood in context as prohibiting disparate treatment based on "old age," the term "age discrimination" – which, after all, is what the ADEA

prohibits – has consistently been understood by this Court as disparate treatment based on old age, not chronological age. *See Hazen Paper*, 507 U.S. at 610; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

The fact that the word "older" appears in § 4(f)(2)(B)(i) of the ADEA, but not in § 4(a)(1), is of no aid to respondents and the United States. *See* US Br. 12. The inclusion of the word "older" in the former provision – which was enacted two decades after § 4(a)(1) as part of the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 – does not establish the meaning of statutory language enacted two decades earlier.

Moreover, inclusion of the word "older" was necessary, in the words of OWBPA § 101, to clarify Congress's intention "to restore the original congressional intent . . . to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." That being so, § 4(f)(2)(B)(i) cuts in favor of reading the word age in § 4(a)(1) as meaning "old age" rather than "chronological age." *See* Pet. Br. 35-36. Congress, of course, had no comparable need to include the word "older" in § 4(a)(1) when the ADEA was enacted, as the presence of the very same term in the statutory findings and purposes made clear that Congress was prohibiting disparate treatment based on old age. ADEA § 2, 29 U.S.C. § 621 (noting problems "older workers" face "relative to the younger ages").[1]

[1] Respondents' plain meaning argument based on the term "discriminate" in § 4(a)(1) is insubstantial. *See* Resp. Br. 14-18. As respondents acknowledge, the Americans with Disabilities Act, contains a prohibition of "discrimination" that does not run in both directions. *See id.* at 20. The same is true here. Nor is respondents' reading dictated by the language in § 4(a)(1) protecting "any individual" from discrimination. That argument rests on a faulty analogy to Title VII. *See* Pet. Br. 15 n.1.

2. At a deeper level, the "plain meaning" argument advanced by respondents and the United States violates the "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). *See generally* John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2456-70 (2003). Determining whether § 4(a)(1) authorizes disparate treatment claims by employees 40 or older based on their relative youth is not a matter of "definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). The question is whether such a reading "produces a *substantive effect* that is compatible with the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (emphasis added). The reading of § 4(a)(1) advanced by respondents and the United States fails that test. Interpreted in the context of the ADEA as a whole, § 4(a)(1) can fairly be read *only* as a ban on disparate treatment based on old age.

First, the findings and purposes Congress expressly set forth in the ADEA itself focus exclusively on problems older workers face "relative to the younger ages." ADEA § 2, 29 U.S.C. § 621.[2] These congressional statements

[2] Congress found that "older workers find themselves disadvantaged in their efforts to retain employment," that "arbitrary age limits . . . may work to the disadvantage of older persons," and that "the incidence of unemployment . . . is, relative to the younger ages, high among older workers," and declared that the "purpose" of the ADEA

cannot be ignored on the ground that the "plain meaning" of § 4(a)(1) authorizes youth discrimination claims. Resp. Br. 12-13; US Br. 14-17. "[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). And the ADEA's findings and purposes provide the context that illuminates the meaning of § 4(a)(1). *See Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-98 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). The problems Congress identified in the ADEA are problems older workers face because they are perceived as being too old, not because they turn 40 and are suddenly subject to adverse treatment because they are too young.

Second, respondents' interpretation is incompatible with Congress's decision to limit the protections of § 4(a)(1) to persons 40 and older. ADEA § 12(a), 29 U.S.C. § 631(a). It makes no sense to conclude that Congress forbade employers from ever considering chronological age in making employment decisions, but then limited the group that can assert this protection to those 40 and older. If arbitrary discrimination against the relatively young is a problem, those under 40 are far more likely to experience such discrimination than are those 40 and over. Yet, if respondents were correct, only the latter group could challenge it.

The United States nevertheless strains to reconcile its reading of § 4(a)(1) with the limitations imposed by § 12(a). According to the United States, Congress could reasonably

---

included "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." ADEA § 2, 29 U.S.C. § 621.

have sought to protect only workers 40 and older from disparate treatment based on their relative youth because "workers who are under 40, as a class, do not face the same difficulties in the workplace, or the same difficulties in regaining employment, as workers who are at least 40." US Br. 17. But, as the United States acknowledges, workers 40 and older face increased difficulties because they are unfairly stereotyped as being too *old*. *That* is the harm against which the ADEA protects; it is not a broad prophylactic against subjecting workers 40 and older to any arbitrary adverse employment decisions because they would face greater difficulties as a result of age-based stereotypes were they to lose their jobs.[3] Indeed the logic of the United States' position would expand § 4(a)(1) to protect those 40 and older from disparate treatment for *any* reason, because their comparatively old age would make it more difficult to rebound. Thus, the attempt by the United States to reconcile its position with § 12(a) is a further reason to *reject* that position, not accept it.

At bottom, the conception of the ADEA advanced by respondents and the United States is untenable. Rather than interpreting § 4(a)(1) in a manner that addresses the concerns

---

[3] The United States contends that "[f]or a 42-year-old employee who is fired because of his age and must seek new employment, it does not matter whether he was replaced by a 30-year-old or a 50-year-old." US Br. 14. But this assumes its own conclusion, *i.e.*, that the discharge alone is prohibited. A forty-two year old discharged for cause, or for no reason at all, must also seek new employment, and may also have difficulties being rehired, but the employee's discharge does not violate the ADEA. The forty-two year old is protected from being discharged on the ground that he is too old, and if he is discharged, he is protected from being denied a new job because he is an older worker.

identified by Congress in the ADEA itself, that rationalizes all of the Act's substantive provisions and limitations, and that allows for coherent and practical administration, respondents and the United States instead propose a sweeping expansion of the ADEA to cover conduct that Congress did not give the slightest indication of considering objectionable – much less so objectionable as to be made unlawful. They do so, in other words, despite the complete absence of any indication that Congress perceived a problem of discrimination favoring relatively older workers at the expense of relatively younger workers – or that employees face a particular risk of such disparate treatment once they turn 40.

Against this background, there is no reason to think Congress would have enacted a statute with the massively disruptive consequence of making all employment preferences for the comparatively older presumptively unlawful. To the contrary, a preference for older workers is often rational, and is in many ways socially beneficial. Indeed, the efforts on the part of respondents and the United States to show that their interpretation is consistent with the ADEA as a whole are unconvincing precisely because they are divorced from these realities. What respondents and the United States mean by "consistent" is that their reading of § 4(a)(1) can be shoehorned into the ADEA without creating any fatal contradictions with the Act's other provisions. That is a far cry from ascertaining the objective import of § 4(a)(1) by considering it in light of the ADEA as whole. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Although the United States acknowledges (at least in part) that its proposed interpretation of § 4(a)(1) will cast a cloud over beneficial employment practices, its proposed

solution is wholly unsatisfactory. With respect to retiree health benefit plans such as the one offered here by General Dynamics Land Systems Inc. ("General Dynamics"), the United States tries to save such plans from illegality by invoking an affirmative defense (§ 4(f)(2)(B)(i)) that Congress added to the ADEA to serve quite different purposes. *See* Pet. Br. 35-36. But the incongruities produced by expanding § 4(a)(1) to "youth discrimination" claims do not end with retiree health plans. After all, § 4(f)(2)(B)(ii) of the ADEA allows employers to maintain voluntary early retirement incentive plans only when they are "consistent with the relevant purpose or purposes of this chapter." 29 U.S.C. § 623(f)(2)(B)(ii). If § 4(a)(1) forbids favoring older workers over younger workers, then no such plan could satisfy this statutory test unless it were offered to all employees 40 and older. The United States would presumably invoke § 4(*l*) of the Act to defend plans with a minimum eligibility requirement greater than 40, but that provision does not apply to all voluntary early retirement incentive plans, *see* 29 U.S.C. § 623(*l*) – and in any event, the United States would once again be redeeming its misguided interpretation of § 4(a)(1) by relying on a provision enacted to serve different ends. *See infra* pp. 10-11. That the United States is required to go to such lengths to preserve beneficial employment practices is powerful evidence that its basic conception of the ADEA is wrong: such practices should not be presumptively unlawful in the first place.

3. In view of the above, it is unsurprising that respondents and the United States fail in their effort to find support for their interpretation of § 4(a)(1) in the overall structure of the ADEA. The United States asserts that the "ADEA cannot function harmoniously" if General

Dynamics' reading of § 4(a)(1) is adopted. *See* US Br. 10-12. That contention, however, is merely a rhetorically overblown invocation of the canon that words are presumed to mean the same thing every time they appear in a statute. Specifically, the United States contends that "age" cannot mean "old age" in the ADEA's advertising and bona fide occupational qualification ("BFOQ") provisions, §§ 4(e), (f)(1), 29 U.S.C. §§ 623(e), (f)(1), and that it therefore should not be read to mean "old age" in § 4(a)(1).

That argument fails at every level. To begin with, the purported linguistic inconsistency of reading § 4(a)(1) as "old age" is exaggerated.[4] And, on the other hand, reading § 4(a)(1) as meaning "chronological age" most certainly results in linguistic inconsistency. The word "age" does not mean "chronological age" in § 2(b) of the Act, which identifies as one of the Act's purposes "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). There, Congress is referring to problems that arise as workers grow older – problems associated with "old age." The provision would be nonsensical if the word "age" were interpreted to mean "chronological age," because chronological age has no systematic "impact . . . on employment."

---

[4] One could quite reasonably read "age" to mean "old age" in § 4(e). That provision contains a laundry list of prohibitions – "preference, limitation, specification, or discrimination," 29 U.S.C. § 623(e) – to indicate that it is unlawful in any way to advertise that an employer does not desire to hire older workers. Moreover, it is hardly "inexplicable" as the United States suggests (US Br. 10) that an employer could not advertise its preference for older workers but could have a policy of hiring older workers. The former is a "preference . . . based on age," 29 U.S.C. § 623(e), but the latter is not "discrimination . . . because of . . . age." *Id.* § 623(a)(1).

The canon that words are presumed to mean the same thing every time they appear in a statute thus does not support the United States here. *See Robinson*, 519 U.S. at 343. In all events, that canon is a "rule[] of thumb," not an unalterable command. *See generally Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996). Because "[i]t is not unusual for the same word to be used with different meanings in the same act," the presumption of uniformity "readily yields" when it is reasonable to conclude that the same word was "employed in different parts of the act with different intent." *Atlantic Cleaners & Dyers v. United* States, 286 U.S. 427, 432 (1932) (construing "restraint of trade or commerce" differently in two sections of Sherman Act); *accord United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212-14 (2001) (construing "wages paid" to mean two different things in the same amendment); *Robinson*, 519 U.S. at 341, 346 (construing "employee" to mean different things in different sections of Title VII); *Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887, 1893-94 (2003).

The question before this Court is not what the word "age" means considered in isolation in § 4(a)(1) or anywhere else in the ADEA, but what the operative language in § 4(a)(1) barring discrimination "against any individual . . . because of such individual's age" means. As *Cleveland Indians* makes clear, that question is properly answered by contextual indicators of congressional meaning – here, the statutory findings and purposes, and the limitation of those protected to persons 40 and older – not by acontextual application of an interpretive canon. Thus, the canon on which the United States relies should "readily yield[]" to these substantive textual indicators that § 4(a)(1) bars only

discrimination based on old age. *See Atlantic Cleaners & Dyers*, 286 U.S. at 433.

Nor is the United States correct that the ADEA cannot "function coherently" as a substantive matter if § 4(a)(1) is interpreted to bar only disparate treatment based on old age. US Br. 9. To the contrary, there is no substantive incompatibility between § 4(a)(1) so read and the Act's advertising and BFOQ provisions. Section 4(e), which prohibits advertisements "indicating any preference, limitation, specification, or discrimination, based on age," 29 U.S.C. § 623(e), forbids employers from advertising a preference for younger workers – exactly what § 4(a)(1) prohibits. Section § 4(f), which allows employers to take any action "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. § 623(f), authorizes employers to do what § 4(a)(1) otherwise prohibits – *i.e.*, prefer younger workers over relatively older workers – when employers meet that provision's requirements. Neither provision is rendered superfluous or inoperative if § 4(a)(1) is read to bar only discrimination based on old age.

Finally, the United States draws an incorrect inference from the pension benefit plan provision, § 4(*l*), which Congress added to the ADEA in the OWBPA in 1989. *See* US Br. 13. The provision clarifies that employers do not violate the ADEA solely because they establish a "minimum age as a condition of eligibility for normal or early retirement benefits." ADEA § 4(*l*), 29 U.S.C. § 623(*l*).

The United States posits that the "most logical explanation" for § 4(*l*) is that it was necessary to exempt such plans from the general prohibition on favoring the older over the younger. US Br. 13. The real explanation for this

provision is different. At the time the OWBPA was enacted, some circuit authority held that "*every* retirement under an early retirement plan creates a prima facie case of age discrimination" by potentially coercing older workers into retiring before they are ready, and that "the employer must show both that the details of the plan have solid business justification and that each decision to retire is 'voluntary.'" *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987) (Easterbrook, J.) (criticizing *Paolillo v. Dresser Indus.*, 813 F.2d 583 (2d Cir. 1987)).[5] Subsection (*l*) clarified that minimum age requirements for early retirement benefits do not automatically subject employers to standard age discrimination claims. H.R. Rep. No. 101-664, at 38, 59 (1990). It was not added to insulate such benefits from challenges by those 40 or older but too young to qualify.

4. Respondents' analogy to Title VII does not help them. To be sure, Title VII – which prohibits discrimination against "any individual . . . because of such individual's race . . . [or] sex" – bars disparate treatment favoring as well as disfavoring persons of any race or either gender. But the text of Title VII differs from the ADEA in crucial respects that preclude drawing the analogy respondents seek to draw. Unlike the word "age" in § 4(a)(1) of the ADEA, which can mean either chronological age or old age, the words "sex" and "race" in Title VII cannot have the linguistic meaning of only one race or only one sex. Similarly, Title VII's protection of "any individual" necessarily insulates persons of all races and both genders from any type of disparate

---

[5] The Second Circuit subsequently withdrew this opinion, but continued to hold that, absent proof of voluntary employee acceptance, an early retirement plan violated the ADEA. *Paolillo v. Dresser Indus., Inc.*, 821 F.2d 81, 84 (2d Cir. 1987).

treatment based on race or gender. The ADEA is not parallel in this respect. *See* Pet. Br. 15 n.1.

Thus, Title VII's text all but compelled the conclusion that the statutory prohibition covered the conduct in question in *McDonald* (disparate treatment of whites) and *Oncale* (same sex harassment). *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-79 (1998). The ADEA's text does not similarly compel the conclusion that employees 40 and older can challenge disparate treatment based on their relative youth. *McDonald* and *Oncale*, moreover, rest on the recognition that their holdings make unlawful precisely the kind of wrong Congress enacted Title VII to address. *McDonald*, 427 U.S. at 280; *Oncale*, 523 U.S. at 79. In stark contrast, the reading of § 4(a)(1) proposed by respondents and the United States would extend the ADEA to cover a concern that was (as respondents concede) foreign to the enacting Congress. *See* Resp. Br. 9-10.

It is thus very much to the point that Congress did not simply amend Title VII by adding the word "age," but instead enacted an entirely separate statute. Indeed, when Title VII was enacted, Congress rejected proposals that would have banned discrimination based on age, and instructed the Secretary of Labor to study age discrimination. *Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment*, at 1 (1965). The ensuing report, which was the foundation for the ADEA, concluded that discrimination based on age "means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving – for example – race." *Id.* at 2.

The Court has thus recognized the "significant differences" between Title VII and the ADEA, and has repeatedly rejected arguments that the ADEA should be construed identically to Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584-85 (1978); *EEOC v. Arabian Am. Oil Co*, 499 U.S. 244, 256 (1991). Indeed, this Court has refrained from adopting in ADEA cases the disparate impact theory and Title VII's burden-shifting model. *See Hazen Paper*, 507 U.S. at 610; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996). The analogy to Title VII is therefore inapt.[6]

II. The United States' Invocation of the ADEA's Legislative History Fails.

In the vast legislative history of the ADEA, the sole support the United States can muster for the proposition that § 4(a)(1) authorizes youth discrimination claims is a brief, ambiguous colloquy between Senators Yarborough and Javits. US Br. 18-19. But "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). There is no reason to believe that other Members of Congress heard the colloquy, much less that it

---

[6] Respondents' "snapshot" argument is a red herring. The interpretation of § 4(a)(1) they advance would make any age differential presumptively unlawful whether it operated as a snapshot or as a so-called "age-based 'attainment' goal." Resp. Br. 8, 17. Respondents also ignore the inherent fairness of the collective bargaining agreement in this case, which provides retirement health benefits to the oldest employees who, given their relatively advanced age, would have less time to recover from and adjust to the change in benefits. *See* Pet. Br. 42.

influenced their votes. *See United States v. O'Brien*, 391 U.S. 367, 384-85 (1968).

To the extent the Court looks beyond the statutory text (and it need not do so), the committee reports are a far more reliable guide to the meaning of the ADEA. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186-87 (1969). Not a word in those reports suggests that Congress intended to authorize ADEA suits by employees who claim they were treated unfairly because of their relative youth. H.R. Rep. No. 90-805 (1967); S. Rep. No. 90-723 (1967).

III. The Judgment Below Cannot Be Defended on the Basis of the EEOC's Interpretive Guideline.

Not until the end of its brief does the United States invoke the interpretive guideline of the Equal Employment Opportunity Commission ("EEOC") as a ground for reading age in § 4(a)(1) as meaning "chronological age." US Br. 26-29 (citing 29 C.F.R. § 1625.2). Even then, the United States makes only a sheepish plea for deference to the guideline. That is doubtless because deference is insupportable, and the guideline provides no basis for affirming the Sixth Circuit.

1. As an initial matter, it is ironic that the United States invokes the EEOC guideline, as the guideline would appear to protect General Dynamics' plan, not condemn it. Subpart (b) recognizes the legality, under particular conditions, of extending "additional benefits . . . . to older employees within the protected group," 29 C.F.R. § 1625.2(b). General Dynamics' plan meets those conditions. It (1) offers "additional" benefits "over and above" those provided to younger workers (*see* Resp. Br. 25); (2) "will counteract problems related to age

discrimination" (29 C.F.R. § 1625.2) because, as respondents concede, "an employer's oldest workers generally have fewer working years to recover from changes in their benefits" (Resp. Br. 25) and (3) is "not . . . used as a means to accomplish practices otherwise prohibited by the Act," 29 C.F.R. § 1625.2, because the plan does not disfavor workers because they are too old.[7]

Indeed, the EEOC and its predecessor the Department of Labor ("DOL") have routinely rejected claims (indistinguishable from those here) that § 4(a)(1) prohibits disparate treatment based on employees' relative youth. *Isabella v. Runyon*, No. 01944083, 1995 WL 653513, at *1 (E.E.O.C. Oct. 19, 1995) (retirement date); *see also DuPriest v. Bentsen*, No. 01942145, 1994 WL 1755951, at *2 (E.E.O.C. May 2, 1994) (retirement plan); *Burt v. Bentsen*, No. 01942163, 1994 WL 735377, at *2 (E.E.O.C. Apr. 29, 1994) (same). These opinions – far from being mere "statements" that were justified by § 4(*l*)(1)(A) (*see* US Br. 27 n.5) – unambiguously concluded that complaining parties, over 40, had "fail[ed] to state a claim under the ADEA, because . . . the ADEA protects persons who are treated differently than persons who are *younger*." *Isabella*, 1995 WL 653513, at *1 (emphasis added); *see DuPriest*, 1994 WL 1755951, at *2; *Burt*, 1994 WL 735377, at *2.[8] Similarly,

---

[7] The United States tries to brush off subpart (b), contending it is "not at issue here." *See* US Br. 27 n.4. But the meaning of subpart (a) is inherently intertwined with the meaning of subpart (b).

[8] Although the United States asserts without citation that these decisions are not precedential, US Br. 27-28 n.5, they were signed by the officer authorized to issue "final" decisions "on behalf of the Commission." 29 C.F.R. §§ 1614.405, 1614.407 (1994); 29 C.F.R. §§ 1614.405, 1614.407 (1995).

DOL has approved a variety of practices, including excusing employees 55 and over from physically demanding tasks, Letter WH-389, 1976 WL 41742 (June 25, 1976), and "evening shifts and holidays," Letter WH-419, 1977 WL 53487 (July 1, 1977),[9] on the ground that "[t]he purpose of the ADEA is to protect the older worker from employment practices that discriminate against him in favor of younger workers." *E.g.*, Letter WH-419, 1977 WL 53487.[10]

2. Putting these incongruities and inconsistencies to the side, and reading the EEOC guideline as endorsing claims of disparate treatment based on relative youth, the guideline is unlawful. "Even contemporaneous and longstanding agency interpretations [which § 1625.2 obviously is not] must fall to the extent they conflict with statutory language." *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989). Whether such a conflict exists is determined by the language of the statute as a whole and by employing all the "traditional tools of statutory construction." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, at 843 & n.9 (1997); *Brown*, 513 U.S. at 117-22. The United States cannot manufacture the statutory ambiguity necessary to justify *Chevron* deference in this case merely by pointing to the fact that the word

[9] *See also* Letter WH-404, 1976 WL 41753 (Aug. 26, 1976); Leter WH-451, 1978 WL 51448 (Jan. 31, 1978).

[10] Although the United States asserts without citation that the guideline was never amended to reflect these DOL opinion letters, *see* US Br. 27-28 n.5, the EEOC explained when it announced its guideline in 1981 that "[t]he Commission intends that the final interpretation contained in paragraph (b) of this section provide [sic] for a continuation of the flexible approach first announced in administrative Opinion Letters of the Department of Labor." 46 Fed. Reg. 47724 (Sept. 29, 1981) (referring to WH-404, Aug. 26, 1976, and WH-451, Jan. 13, 1978).

"age" in § 4(a)(1) can (considered in isolation) mean either chronological or old age. "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown*, 513 U.S. at 118; *Deal*, 508 U.S. at 131-32. Thus, as demonstrated, employing the traditional tools of statutory construction to ascertain § 4(a)(1)'s meaning, the EEOC is foreclosed from expanding § 4(a)(1) to reach youth discrimination claims.

3. While the foregoing meets the United States on its own ground, the EEOC's guideline is not in fact entitled to *Chevron* deference because it was never intended to be the kind of substantive action that has the force of law. The EEOC promulgated the guideline as an "interpretation" rather than as a "substantive regulation." *Compare* 29 C.F.R. § 1625 Subpart A *with* 29 C.F.R. § 1625 Subpart B. That was no accident. In 1968, when DOL originally promulgated the predecessor guideline, it stated that the guideline was intended merely to provide "a practical guide to employers and employees" as to how DOL viewed its enforcement authority. 29 C.F.R. §§ 860.1, 860.91 (1969). To be sure, when the EEOC repromulgated the guideline in 1981 it did so after notice and comment, but only "to comply with the spirit" of a Carter Administration Executive Order requiring comment on *all* proposed regulations. 43 Fed. Reg. 12661 (Mar. 23, 1979). Critically, the EEOC did not comply with the 30-day notice period required for substantive rules, 46 Fed. Reg. 47724; *see also* 5 U.S.C. § 553(d), and deliberately chose to maintain the guideline as a nonbinding interpretation. *See* 46 Fed. Reg. 47724.[11] As such, the guideline is not entitled to *Chevron* deference.

[11] The same EEOC "Interpretations" endorse a "disparate impact" theory of ADEA liability. *See* 29 C.F.R. § 1625.7.

Christensen v. Harris County, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

It is, of course, perfectly plain that the guideline does not warrant any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Neither respondents nor the United States have resolved the obvious contradictions between subparts (a) and (b) of § 1625.2 that would exist if the guideline were read as they propose. *See* Pet. Br. 38-39. Moreover, their interpretation can hardly be said to be a consistent or longstanding one. Over the 35 years since Congress enacted the ADEA, the DOL and then the EEOC have *never* sought to enforce judicially a claim of discrimination based on relative youth, and have upheld such a claim in only one administrative enforcement proceeding. *Garrett v. Runyon*, No. 01960422, 1997 WL 574739 (E.E.O.C. Sept. 5, 1997), *aff'd sub nom. as modified, Garrett v. Henderson*, No. 01960422, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999).[12] And, as demonstrated *supra*, they have routinely rejected claims of disparate treatment by workers 40 and older based on their relative youth. Thus, this Court should give the EEOC guideline no weight whatsoever in deciding the present case.

IV. The Interpretation Advanced By Respondents and the United States Would Inflict Serious Real-World Harms.

Respondents and the United States utterly fail to come to grips with the severe practical harms their

[12] The United States points to two earlier DOL opinion letters supporting its reading, but DOL explicitly revoked both. *See* Letter WH-389, 1976 WL 41742 (June 25, 1976) (revoking Opinion Letters WH-30 (May 1, 1970) and WH-36 (May 25, 1970)).

interpretation of § 4(a)(1) would inflict. Ubiquitous and uncontroversial employment practices would be rendered flatly unlawful or would be placed at risk of being found unlawful. Employers thus would find themselves in a "40 and older" straightjacket, forced to extend favorable treatment equally to all employees in that group or to none. The obvious, and perverse, consequence of adopting such a rule is certain to be that employers will decline to offer benefits or other favorable consideration to anyone 40 or older, rather than risk ADEA liability by extending favorable treatment to only some. That is why not only groups representing employers but also those representing workers have urged this Court to reject the view espoused by respondents and the United States.

Despite the soothing assurances offered by the United States, the view it advocates would throw into question beneficial employee benefit plans designed to protect the oldest of workers. *See* US Br. 22-23. At the very least, it would subject any employer offering such a plan to the risk of vexatious and costly litigation. That prospect – even if any such litigation ultimately would be baseless – would create uncertainty with respect to current plans and no doubt would deter employers from offering such plans in the future.

To go beyond this particular case for a moment – and beyond its benefit plan context – authorizing disparate treatment claims based on relative youth would make illegal – without any possibility of a statutory affirmative defense – efforts on the part of employers to accommodate the needs of relatively older workers. It would become unlawful to engage in practices expressly approved by DOL, such as allowing only the oldest workers to opt out of operating

heavy machinery, Letter WH-389, 1976 WL 41742 (June 25, 1976), or to decline to work night shifts. Letter WH-419, 1977 WL 53487 (July 1, 1977). It also would mean that an employer could not relax eligibility or performance standards for its oldest workers, because to do so would discriminate against those too young to qualify for the relaxed standard. For example, it would make illegal the sliding scale system used by the Marshals Service, under which "older deputies can earn points for lower levels of fitness than younger ones." *Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996). Such a practice would not fall within the BFOQ defense, because being less fit is the opposite of a bona fide occupational qualification. It hardly makes sense to interpret the ADEA as forbidding employers from making such accommodations to keep older workers in the workforce. Yet that is precisely what respondents and the United States propose to do.

Expanding § 4(a)(1) as respondents and the United States advocate would thus overturn 35 years of settled judicial doctrine, on which employers have relied in running their businesses and structuring their employment decisions. As General Dynamics pointed out in its opening brief, employers would be put at risk of liability whenever an employment action disproportionately impacted some identifiable cohort of those 40 or older, and would be certain to face a flood of new litigation testing the limits of the massive expansion of the ADEA respondents and the United States propose. Pet. Br. 44-45. Neither respondents nor the United States even try to answer those objections.

CONCLUSION

The decision of the Sixth Circuit should be reversed.

Respectfully submitted,

WILLIAM J. KILBERG
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

DONALD B. VERRILLI, JR.
Counsel of Record
DEANNE E. MAYNARD
JARED O. FREEDMAN
MARTINA E. VANDENBERG
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

October 3, 2003

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

(7)

No. 02-1080

IN THE SUPREME COURT OF THE UNITED STATES

GENERAL DYNAMICS LAND SYSTEMS, INC.,

Petitioner,

v.

DENNIS CLINE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF NEITHER PARTY

LAURIE A. MCCANN*
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for *Amicus Curiae* AARP

*Counsel of Record

32 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT .....

I. CONGRESS ENACTED THE ADEA TO PROHIBIT EMPLOYERS FROM DISCRIMINATING AGAINST OLDER WORKERS IN FAVOR OF YOUNGER WORKERS 4

A. The Text of the ADEA Demonstrates Congress' Clear Intent To Protect Older Workers From Discrimination In Favor of Younger Workers 4

1. The Findings and Purposes of the ADEA Document Congress' Focus on the Discrimination and Other Age-Related Obstacles Workers Face as They Grow Older 4

2. In Limiting the ADEA's Protected Class to Those 40 and Older, Congress Demonstrated Its Intent to Prohibit Discrimination Based on Advancing Age 7

3. The ADEA's "Equal Benefit Or Equal Cost" Rule Provides Strong Textual Evidence of Congress' Intent to Protect Older Workers from Discrimination in Favor of Younger Workers 11

B. The ADEA's Legislative History Contains Overwhelming Evidence That In Enacting the ADEA Congress Was Seeking to Address the Age-Related Problems Workers Face as They Grow Older 13

II. THE ADEA DOES NOT PROHIBIT EMPLOYERS FROM ESTABLISHING MINIMUM AGE REQUIREMENTS FOR BENEFITS OR FROM TREATING OLDER MEMBERS OF THE PROTECTED GROUP MORE FAVORABLY 19

III. ALLOWING INDIVIDUALS TO BRING CLAIMS UNDER THE ADEA THAT THEY WERE DISCRIMINATED AGAINST BECAUSE OF THEIR YOUTH WILL UNDERMINE THE VERY SPIRIT AND PURPOSE OF THE ACT 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES **Pages**

Bergen Commercial Bank v. Sisler, 723 A.2d 944 (N.J. 1999) 9,10

Boston Sand & Gravel Co. v. Untied States, 278 U.S. 41 (1928) 13

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 22

Clackamas Gastroenterology Assoc. v. Wells, 123 S. Ct. 1673 (2003) 22

Cline v. General Dynamics Land Sys., Inc., 296 F.3d 466 (6th Cir. 2002) 4,7,13

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 22

EEOC v. Wyoming, 460 U.S. 226 (1983) 4,14

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 14

Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987) 20

Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), *cert. denied*, 486 U.S. 1044 (1988) ... 19

Maine Human Rights Comm'n v. Kennebec Water Power Co., 468 A.2d 307 (Me. 1983) 9

O'Brien v. Board of Educ. of the Deer Park Union Free Sch. Dist., 127 F. Supp. 2d 342 (E.D.N.Y. 2001) . 19

Ogden v. Bureau of Labor, 682 P.2d 802 (Or. Ct. App. 1984) 9

Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) 13

Rannels v. Hargrove, 731 F. Supp. 1214 (E.D. Pa. 1990) 11

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 22

Solon v. Gary Comty. Sch. Corp., 180 F.3d 844 (7th Cir. 1999) 19,20

Western Airlines, Inc., v. Criswell, 472 U.S. 400 (1985) . 14

Zanni v. Medaphis Physician Servs. Corp., 612 N.W.2d 845 (Mich. Ct.App. 2000) 8

FEDERAL STATUTES AND REGULATIONS

Age Discrimination Act of 1975,
42 U.S.C. §§ 6101-6107 10
42 U.S.C. § 6101 11
42 U.S.C. § 6107 11

Age Discrimination in Employment Act (ADEA),
29 U.S.C. §§ 621 -633 ..... *passim*
29 U.S.C. § 621(a) 4,5
29 U.S.C. § 621(b) 4,5,6
29 U.S.C. § 623 (a) 10
29 U.S.C. § 623(a)(1) 5
29 U.S.C. § 623(f)(2(B)(i) 6,12
29 U.S.C. § 623(f)(2(B)(ii) 6
29 U.S.C. § 623(j)(2) 6
29 U.S.C. § 631(a) 7,10

Elementary and Secondary Education Act of 1965,
§ 9101 11

Older Workers Benefit Protections Act (OWBPA),
Pub. L. No. 101-433, 104 Stat. 978 (1990) 6

Pub. L. No. 95-256, 92 Stat. 191 (1978) 19

Pub. L. No. 99-592, 100 Stat. 3342 (1986) 19

Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964) 14

Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47724 (Sept. 21,1981) 21

29 C.F.R. § 1625.2(b) 20

LEGISLATIVE HISTORY

H. R. Rep. No. 90-805 (1967) 18

H.R. Rep. No. 101-664(1990) 6,12

S. Rep. No. 90-723 (1967) 18

S. Rep. No. 101-263 (1990) 12

Senate Special Comm. On Aging, Developments in Aging: 1996, S. Rep. No. 105-36 (1996) 23

113 Cong. Rec. 31254-55 (Nov. 6, 1967) 12

121 Cong. Rec. 9212 (Apr. 8, 1975) 11

S. 1511 Final Substitute Statement of Managers, 136 Cong. Rec. S13596 (daily ed. Sept. 25, 1990) 6,19

Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong. (1967) 7,23

U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) 14,15,16,17,18

STATE STATUTES

Alaska Stat. § 18.80.220(a)(1) 8

D.C. Code Ann. § 2-1401.02(2) 8

Fla. Stat. Ann. § 760.10(1)(a) 8

Haw. Rev. Stat. § 368-1 8

Iowa Code § 216.6(3) 8

Kan. Stat. Ann. § 44-1112(a) 8

Md. Ann. Code art. 49B, § 16(a) 8

Me. Rev. Stat. Ann. tit. 5, § 4572 8

Mich. Comp. Laws § 37.2103(a) 8

Minn. Stat. § 363.01 8

Miss. Code Ann. § 25-9-149 8

Mont. Code Ann. § 49-2-101(1) 8

Mont. Code Ann. § 49-3-101(1) 8

N. C. Gen. Stat. § 143-422.2 8

N.H. Rev. Stat. Ann. § 354-A:7(I) 8

N.J. Stat. Ann. § 10:5-4 10

N.J. Stat. Ann. § 10:5-12(a) 8,10

N.M. Stat. Ann. § 28-1-7 8

N.Y. Exec. Law § 296(3-a)(a) 8

N.J. Stat. Ann. §§ 10:5-1 8

Or. Rev. Stat. § 659A.030(1)(a) 8

Or. Rev. Stat. 659.030(1)(a) 8,9

Vt. Stat. Ann. tit. 21, § 495(a)(8)(c) 8

MISCELLANEOUS

Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L.J. 27 (1979) 11

EEOC Compliance Manual § 3 (2000) 20,21,22

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonpartisan, nonprofit membership organization of 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans.

One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through

---

[1/] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

its research, publications, and advocacy efforts, AARP seeks to eliminate ageist stereotypes and their arbitrary discriminatory effects, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect those rights and strives to preserve the legal means to enforce them.

This case is of utmost importance to AARP's members. Approximately 45 percent of AARP's members remain active in the work force, most of whom are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 -633. The vigorous enforcement of the ADEA is of paramount importance for the millions of older workers who rely on the Act to deter and remedy invidious age bias in the work place. AARP opposes any judicial interpretation that would weaken the protections afforded by the ADEA, such as that by the court below prohibiting employer practices or policies that extend more favorable treatment to older members of the protected class.

AARP is also very troubled by the increasing trend amongst employers to reduce or terminate health coverage for retirees. The availability of health benefits is a critical factor in retirement decisions, especially among those who are not yet age 65. Since the likelihood of health problems and the cost of insurance increase with age, maintaining health coverage is essential to older individuals facing retirement. Health insurance plays a critical role in protecting financial stability in retirement. If one lacks adequate health coverage, one major health problem could wipe out an individual's retirement savings at a time in life when replacing lost savings is difficult, if not impossible.

For these reasons, AARP sympathizes with the plight of the Respondents who face uncertain financial security in retirement because of the Petitioner's decision to eliminate health care coverage for future retirees. At the same time, however, AARP does not believe that in enacting the ADEA Congress intended to prohibit employer practices or policies

that treat older workers in the statute's protected class more favorably than younger workers.

AARP strongly supports the ADEA and its coverage of all workers age 40 and over. However, the ADEA was enacted to protect this age group from being discriminated against as the grow older because of employers' preference for younger workers. A decision by this Court that the ADEA prohibits employers from proactively assisting older members of the protected group would undermine the effectiveness of the ADEA in eliminating arbitrary age discrimination and in promoting the employment of older workers.

For these reasons, AARP respectfully submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

It is clear from the text, purpose, and the legislative history of the ADEA that Congress intended the Act to provide redress for older workers who are discriminated against in favor of younger workers. In contrast, there is not a scintilla of evidence that Congress intended the ADEA to provide a remedy for employees who claim they were discriminated because of their youth, regardless of their age.

Congress enacted the ADEA to address the plight of this nation's older workers who were, and are still, denied employment opportunities based on the fact that they are *older* than other candidates for the same opportunities. Older workers are let go in reductions-in-force because employers want "fresh blood"; they are turned away for jobs because they are "overqualified"; and they are denied training and promotional opportunities because "old dogs can't learn new tricks." The ADEA was designed to eliminate these serious problems faced by older workers, which become more severe and more prevalent with increasing age. Its effectiveness for doing so, however, will be significantly undermined if this Court rules that employers may not treat older workers in the protected class more favorably in recognition of the extensive age-related obstacles they face.

ARGUMENT

I. CONGRESS ENACTED THE ADEA TO PROHIBIT EMPLOYERS FROM DISCRIMINATING AGAINST OLDER WORKERS IN FAVOR OF YOUNGER WORKERS.

A. The Text of the ADEA Demonstrates Congress' Clear Intent To Protect Older Workers From Discrimination In Favor of Younger Workers

In enacting the ADEA, Congress sought to eliminate the widespread age discrimination that plagues individuals' efforts to find and to retain employment as they advance in age. It is evident from the plain language of the ADEA that Congress intended the Act to provide a remedy for individuals who are denied employment opportunities and benefits because they are too old - and not because they are too young. Indeed, the principal objective of the ADEA is to eliminate the discrimination against employees and applicants that emerges and that worsens as they age.

1. The Findings and Purposes of the ADEA Document Congress' Focus on the Discrimination and Other Age-Related Obstacles Workers Face as They Grow Older.

The findings and purposes of the ADEA set out in 29 U.S.C. §§ 621 (a) and (b) are important parts of the statute and are not merely "hortatory," as characterized by the Sixth Circuit. *Cline v. General Dynamics Land Sys., Inc.*, 296 F.3d 466, 470 (6th Cir. 2002). These sections of the ADEA summarize the results of "the extensive factfinding undertaken by the Executive Branch and Congress," that culminated in the passage of the ADEA. *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). In clear terms, Section 621 sets out the problems and concerns that motivated Congress to enact the ADEA and to structure the law as it did. The ADEA was enacted because:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of *arbitrary age limits* regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, *relative to the younger ages, high among older workers*; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a) (emphases added). Based on these findings, it is clear that the problems individuals face in obtaining and retaining employment as they grow older was the impetus for the enactment of the ADEA.

When Congress drafted the ADEA, it also included specific "purposes." The three stated purposes of the ADEA are: "to promote employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). By specifically referring to the ADEA's purposes in two of the statute's affirmative defenses, Congress indicated that it intended the purposes to play a critical role in defining what is prohibited by § 4(a)(1), 29 U.S.C. § 623(a)(1).

Section 4(j)(2) of the ADEA states that it is not unlawful for a state or local government to refuse to hire or to discharge an individual as a firefighter or law enforcement officer "pursuant to a bona fide hiring or retirement plan *that is not a subterfuge to evade the purposes of [the ADEA]*." 29 U.S.C. § 623(j)(2) (emphasis added). Similarly, in enacting the Older Workers Benefit Protections Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), Congress established a limited affirmative defense for voluntary early retirement incentive plans. Section 4(f)(2)(B)(ii) of the ADEA, as added by the OWBPA, states, "[i]t shall not be unlawful for an employer . . . to observe the terms of a bona fide employee benefits plan that is a voluntary early retirement incentive plan *consistent with the relevant purpose or purposes of [the ADEA]*." 29 U.S.C. § 623(f)(2)(B)(ii) (emphasis added). In determining whether early retirement incentive plans violate § 4(a)(1) of the ADEA or satisfy the affirmative defense, courts have looked directly to the purposes of the ADEA set out in § 621(b).[2/]

Finally, the purposes of the ADEA are also directly implicated by another of the Act's affirmative defenses. Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), provides a narrow defense to a claim that an employer provides lower benefits to older workers than younger workers. Because the cost of some benefits increase with age, the "equal benefit or equal cost" rule provides that an employer is required only to spend the same amount to provide the benefit for an older worker as for a younger worker. The "equal benefit or equal cost" rule was enacted to "harmoniz[e] two purposes of the ADEA in applying the Act to employee benefit plans: eradicating arbitrary discrimination based on age and promoting the hiring of older persons." H.R. Rep. No. 101-664, at 34 (1990).

[2/] *See* S. 1511 Final Substitute Statement of Managers, 136 Cong. Rec. S13596 (daily ed. Sept. 24, 1990) ("As a general matter, the purpose implicated in considering an early retirement incentive plan or any particular feature of such a plan is the purpose of prohibiting arbitrary age discrimination in employment.").

Congress' focus on ameliorating the plight of workers as they grow older is manifest in the ADEA's findings and purposes. Actions by employers to help older members of the protected class overcome the obstacles they face are consistent with the purposes of the ADEA and should not be prohibited.

2. In Limiting the ADEA's Protected Class to Those 40 and Older, Congress Demonstrated Its Intent to Prohibit Discrimination Based on Advancing Age.

Section 12(a) of the ADEA provides additional textual evidence that Congress intended the ADEA to protect individuals from being discriminated against because they are perceived as too old. Section 12(a) expressly limits the ADEA's protections to "individuals who are at least 40 years of age." 29 U.S.C. § 631(a).

The Sixth Circuit took too simplistic a view of Congress' decision to include a minimum age provision in the ADEA concluding that § 631(a) merely "identified the older workers [Congress] intends to protect." 296 F.3d at 471. In so holding, the Sixth Circuit ignored other provisions of the ADEA which demonstrate that the Act does not provide a remedy for individuals who believe they were discriminated against because of their youth. In addition, when contrasted with other federal and state statutes which do prohibit age discrimination based both on youth and advancing age, the purpose and significance of the ADEA's minimum age provision is abundantly clear.[3/]

[3/] When asked what lowering the minimum age to 21 would do to the proposed legislation that would become the ADEA, Secretary of Labor W. Willard Wirtz responded that it "would change the nature of the proposal from an over-age employment measure. . . ." *Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong. 47 (1967) (statement of Hon. W. Willard Wirtz, Secretary of Labor).

All 50 states and the District of Columbia have enacted laws that prohibit age discrimination in employment with 29 mirroring the ADEA in protecting individuals age 40 and older. The remaining state laws that prohibit age discrimination in employment either do not specify a minimum age requirement or set the minimum age at eighteen.[4/] Several of these laws have been interpreted to permit individuals to claim that they were discriminated against because of their youth. The state courts interpreting their state statutes as prohibiting discrimination based on youth as well as advancing age, have distinguished the language of their state statutes from that of the ADEA, which prohibits discrimination based solely on advancing age.

In concluding that the Michigan Civil Rights Act (CRA) prohibits discrimination against an individual perceived as being too young, the Michigan Court of Appeals relied on the fact that the statute prohibited discrimination based on age without limiting its reach to any particular age group. *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W. 2d 845 (Mich. Ct. App. 2000). The court contrasted the Michigan statute with the ADEA which "[u]nlike the [CRA], . . . limits the prohibitions against age discrimination 'to individuals who are at least 40 years of age.' 29 U.S.C. § 631(a)." 612 N.W. 2d at 847.

4/ Alaska Stat. § 18.80.220(a)(1) (no age specified); Conn. Gen. Stat. § 46a-60(a)(1) (no age specified); D.C. Code Ann. § 2-1401.02(2) (eighteen or over); Fla. Stat. Ann. § 760.10(1)(a) (no age specified); Haw. Rev. Stat. § 368-1 (no age specified); Iowa Code § 216.6(3) (eighteen or over); Kan. Stat. Ann. § 44-1112(a) (eighteen or over); Me. Rev. Stat. Ann. tit. 5, § 4572 (no age specified); Md. Ann. Code art. 49B, § 16(a) (no age specified); Mich. Comp. Laws § 37.2103(a) ("chronological age"); Minn. Stat. § 363.01, Subd. 3 ("age of majority"); Miss. Code Ann. § 25-9-149 (no age specified); Mont. Code Ann. §§ 49-2-101(1) and 49-3-101(1) ("number of years since birth"); N.H. Rev. Stat. Ann. § 354-A:7(I) (no age specified); N.J. Stat. Ann. § 10:5-12(a) (no age specified); N.M. Stat. Ann. § 28-1-7 (no age specified); N.Y. Exec. Law § 296(3-a)(a) (eighteen or over); N. C. Gen. Stat. § 143-422.2 (no age specified); Or. Rev. Stat. § 659A.030(1)(a) (eighteen or over); Vt. Stat. Ann. tit. 21, § 495(a)(8)(c) (eighteen or over).

In *Maine Human Rights Comm'n v. Kennebec Water Power Co.*, the plaintiff claimed he was discriminated against based on his youth after applying for a position two times, once when he was 34 and once when he was 37, when in both instances the position was given to a 57-year-old man. 468 A.2d 307 (Me. 1983). In reversing a lower court's dismissal of the claim, after reviewing the text and the legislative history of the Maine statute,[5/] the Supreme Judicial Court of Maine emphasized that unlike the ADEA, which "specifically limit[s] its protection to a particular age group; [the Maine Human Rights Act] is age-neutral." *Id.* at 309.

In *Ogden v. Bureau of Labor*, 682 P.2d 802 (Or. Ct. App. 1984), a 30-year-old woman claimed she was denied employment as a beautician at a retirement home because she was too young. The defendant argued that the Oregon Fair Employment Practices Act, Or. Rev. Stat. 659.030(1)(a) (2001), "was intended to protect an employee possessed of age, not of youth." *Id.* at 807 However, according to the Court of Appeals of Oregon, "The plain message of the statute is otherwise." *Id.* In sharp contrast to the ADEA, which limits its protection to older individuals, the Oregon statute protects individuals age 18 and older from age discrimination. In choosing 18 as the minimum age for protection against age discrimination, the Oregon legislature, unlike Congress, clearly intended to address all forms of age discrimination and chose not to focus solely on the problem of older workers being denied employment opportunities because of increasing age. *Id.*

The Supreme Court of New Jersey ruled in *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999), that a 25-year-old who was terminated from his vice-president position because of his employer's perception that he was too young for the job could invoke the anti-age-discrimination

---

5/ During the debate in the Maine House of Representatives, one Representative commented, "I would like to remind all of us that what we are talking about here is the rights of individuals, the right of all Americans. We are hoping that everyone will look at this and let these Americans, whether they are 65, whether they are 41, 34, or whatever, to be evaluated on the job they are doing and that is all that we are saying." *Id.* at 309.

provisions of the New Jersey Law Against Discrimination (LAD), N.J. Stat. Ann. §§ 10:5-1 to - 42. Two sections of the LAD prohibit age discrimination. First, N.J. Stat. Ann. § 10:5-4 states:

> All persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age . . . , subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

In addition, N.J. Stat. Ann. § 10:5-12(a) reads:

> It shall be an unlawful employment practice, . . . for an employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

The New Jersey court looked to §§ 623(a) and 631(a) of the ADEA, the same sections the Sixth Circuit relied on below, and concluded that "the ADEA by its terms limits its protection to 'older' workers." 723 A.2d at 950. Based on the "significant language differences between the LAD and the ADEA," *id.* at 957, the court concluded that unlike the ADEA, the LAD protected individuals from being discriminated against whether it was because they were perceived as too young or whether they were believed to be too old. *Id.* at 957-58

Related federal anti-age-discrimination legislation further supports the conclusion that the ADEA does not protect against age bias directed at individuals because they are too young. The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107, consistently and from the outset has been understood to "prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance,"

id., § 6101, because injured individuals are too old *or* too young.[6/] The statute contains no minimum age eligibility provision. Further, in defining covered local governmental entities, it includes many that principally serve children, *i.e.*, any "local educational agency (as defined in § 9101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system." § 6107. Thus, "the ADA [of 1975] does not protect merely the elderly or persons who attain a particular age, but all persons at all times during their lives." Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L. J. 27, 29 (1979).

The legislative history of the 1975 ADA could not be more at odds with that of the ADEA with regard to the question of so-called "reverse discrimination." Reports that accompanied the final bill, statements of chief Congressional sponsors of the law, and views expressed to Congress by representatives of the Executive Branch, all expressly addressed the legislation assuming it applied both to age-based discrimination against the elderly and comparable bias disadvantaging children or other younger persons. *See Rannels v. Hargrove*, 731 F. Supp. 1214, 1220-21 (E.D. Pa. 1990) (summarizing legislative record of ADA of 1975); *accord* Schuck, *supra*, 89 Yale L.J. at 29-30, nn. 13-14 (same).

3. The ADEA's "Equal Benefit Or Equal Cost" Rule Provides Strong Textual Evidence of Congress' Intent to Protect Older Workers from Discrimination in Favor of Younger Workers.

Any doubt that Congress intended the ADEA to protect individuals against discrimination because they are older, not

---

6/ "Its provisions are broad and it is the intent of the committee that it apply to age discrimination at all age levels, from the youngest to the oldest." 121 Cong. Rec. 9212 (Apr. 8, 1975) (statement of Rep. Brademas).

younger, disappears upon consideration of the Act's "equal benefit or equal cost" rule, which states:

> It shall not be unlawful. . . (B) to observe the terms of a *bona fide* employee benefit plan –
>
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker.

29 U.S.C. § 623(f)(2)(B)(i). Significantly, this section commands that the amount spent on older workers may be no less than that spent on younger workers, but it does not prohibit an employer from spending more on older workers. Nor does it state that the cost incurred on behalf of an older worker must be no less than that incurred on behalf of a younger worker outside the protected class. "The language . . . requiring that the 'payment made or cost incurred on behalf of an older worker is not less than that made or incurred on behalf of a younger worker' is designed to provide employers with the flexibility of incurring *greater* costs for benefits on behalf of older workers in appropriate circumstances." S. Rep. No. 101-263, at 18 (1990); H.R. Rep. 101-664, at 34 (1990) (emphasis in original).

Senator Javits, one of the earliest and most influential advocates of the initial ADEA, explained on the floor of the Senate in words later heralded as authoritative, *see* S. Rep. No. 101-263, at 6-7 (1990) (citing 113 Cong. Rec. 31254-55) (Nov. 6, 1967):

> [Under Section 4(f)(2) of the Act], an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers.

Most significant, for purposes of this case, is the fact that neither Senator Javits nor any other member of Congress perceived a need for legislation to protect younger workers against discrimination on grounds of greater benefit expenditures favoring older workers, in the absence of an "equal benefit or equal cost" rule. Rather, Congress enacted the "equal benefit or equal cost" rule so that employers would not be discouraged from hiring older workers in the protected class on account of the increasing cost of benefits as those workers age. It follows that Congress also never contemplated that the ADEA's language could be turned on its head to prohibit employers from incurring greater costs to provide benefits for older workers in the protected class.

B. The ADEA's Legislative History Contains Overwhelming Evidence That In Enacting the ADEA Congress Was Seeking to Address the Age-Related Problems Workers Face as They Grow Older.

The legislative history of the ADEA confirms what the text plainly establishes – the purpose of the ADEA is to provide a means of redress for the discrimination individuals face as they grow older. The Sixth Circuit refused to consider the ADEA's legislative history after concluding that the statute's "plain language" supported the Respondents' claim. 296 F.3d at 469. However, as described above, the ADEA's "plain language" demonstrates that the Act was designed to address the employment problems that workers encounter as they age, particularly their difficulties in competing with younger individuals for the same employment opportunities. Moreover, as the Court has recognized, "Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since, the plain- meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455 (1989), quoting *Boston Sand & Gravel Co. v. Untied States*, 278 U.S. 41, 48 (1928).

While the legislative history of the ADEA is replete with references to Congress' concern that individuals were being discriminated against because employers believed they were too *old*, not a single reference can be found suggesting that Congress worried that individuals age 40 and over might suffer discrimination because of their youth. In short, that individuals age 40 and over might be denied employment opportunities or benefits because they were too young was not even on Congress' radar screen.

In construing the ADEA and the concerns underlying "Congress's promulgation of the [Act]," this Court repeatedly has drawn on the text of a 1965 report prepared by U.S. Secretary of Labor W. Willard Wirtz. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993); *Western Airlines, Inc., v. Criswell*, 472 U.S. 400, 411, 422 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). The "Wirtz Report"[7] satisfied Congress' charge "to make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and the individuals affected." Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964). In his letter of transmittal to Congress, Secretary Wirtz explained that the Report, "presents recommendation for dealing with arbitrary discrimination in employment because of age and with the basic factors which impede the reemployment of displaced workers *as they grow older*." Report at ii; 1967 Leg. Hist. at 17 (emphasis added).

The Report confronted "the problem of discrimination in employment based on aging." Report at 1; 1967 Leg. Hist. at 19. Thus, the authors addressed workplace discrimination "problems associated with advancing years," *id.*, such as "whether or not a prospective employee is [considered] too old

---

[7] U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) ("Report"); *reprinted in* U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act, at 16-41 (1967) ("1967 Leg. Hist.").

to be taken on." *Id.* at 2; 1967 Leg. Hist. at 20. The Report's unambiguous (and in spots highly dramatic) focus was the possible unfairness and thus, devastating impact for a worker of an employer concluding "'You're too old.'" *Id.* at 1; 1967 Leg. Hist. at 19.[8] This record is completely inconsistent with the Sixth Circuit's assessment that Congress in the ADEA outlawed all age discrimination against workers age 40 and older, whether because they are too old *or* too young.

The Report discussed three very different challenges facing older workers in 1965: "arbitrary discrimination," consisting most egregiously - but not exclusively - of explicit age-limits on employer hiring;[9] "forces of circumstance" that limit older worker opportunities; and "institutional arrangements that indirectly restrict the employment of older workers." The Wirtz Report declared the need for a civil rights law to address only the first of these. Yet the Report concluded that all three restrict job opportunities to a degree that grows with the advancing age of workers. By contrast, the Wirtz Report never once identified or articulated a pattern of disadvantage for workers in middle age because employers, or societal forces, or "institutional arrangements" deem them to be too

---

[8] "There is ... no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is that 'You're too old,' that a man turns away, in another poet's phrase, 'nothing to look backward to with pride, nothing to look forward to with hope.' If that verdict is fair on the facts, it can only be viewed as part of life's bruising mystery. But if that verdict is unfair, or unnecessary, it is part of man's inhumanity to man that can and must be stopped." *Id.* at 1; 1967 Leg. Hist. at 19.

[9] The Report noted that in "individual circumstances" arbitrary age bias infects "decisions made about aging and the ability to perform," as well as "institutional arrangements" that "operate indirectly to restrict the employment of older workers." *Id.* at 5; 1967 Leg. Hist. at 22. The Report also questioned employer practices with disparate impacts adverse to skilled older workers, such as tests on which results are "affected by recency of education and testing experience,"and which thus may not accurately measure worker productivity. *Id.* at 14; 1967 Leg. Hist at 14.

young. Hence, the Report contains no support for legal measures to prohibit employer preferences for, or other forces favoring workers in their fifties and sixties over workers in their forties.

The most serious problem of "arbitrary discrimination" outlined in the Wirtz Report was explicit maximum-age hiring limits. These were found "in announced employer policies (*e.g.*, in Help Wanted advertisements; or in job orders filed with employment agencies) or in dealings with [job] applicants." To assess the effect of age limits, the Labor Department surveyed 500 employers in five major cities in states without age bias laws. Only twenty states banned such limits. Of the surveyed employers, "[a]lmost three in five" enforced restrictions in the case of new hires, "most frequently between [ages] 45 and 55." Report at 6-7; 1967 Leg. Hist. at 23-24. Only "[a] very small proportion"of new hires were above 45 years of age, with the problem growing significantly worse for each of three age cohorts: 45-54; 55-64; and 65 and above.

The Report also concluded that "a great many" age limits were "based in fact on considerations quite different" than those stated by employers: these rationales were often pretextual or founded on rank and inaccurate stereotypes about the supposed inadequacies of older workers. In rebuttal, the Report discussed empirical evidence on "aging and human skill" indicating "increasing differences of individual performance with advance in age," as well as "an increasing capacity of the human system to compensate for diminishing abilities, and a wide range of occupational requirements which fall well below the usual range of personal capacities subject to these requirements." *Id.* at 7-8; 1967 Leg. Hist. at 24-25.

By contrast with this systematic exploration of the basis for banning discrimination because workers are too old, the Wirtz Report contains no discussion whatsoever of "arbitrary" age discrimination against workers over age 40 or 45 in favor of still older workers. Similarly, the Report focused on factors unrelated to bias which suppress employment of skilled older workers, yet does not consider comparable factors restricting

opportunities for forty-year-olds while favoring fifty- and sixty-year-olds. The chief culprits identified as limiting work for older individuals - other than arbitrary bias - are described as bearing more heavily on workers as they grow older. These include the growing "pace of technological change," "continually rising levels of education," and "increases in the range of individual [health] differences among workers as age advances." Report at 11-14; 1967 Leg. Hist. at 28-31.[10/]

In its account of institutional arrangements affecting older workers, the Report stressed - as it did in earlier sections - the issue of hiring opportunities, to the exclusion of other possible perspectives on age-based employment discrimination, such as equity in benefits, or other terms and conditions of employment. This priority was consistent with the Report's preoccupation with potential disadvantages associated with advancing age, and thereby diverged from attention that hypothetically might have been devoted to age-based disadvantage for younger segment of the ADEA's protected class. Thus, the Report discussed seniority systems not as disproportionally advantaging the oldest workers, but as resulting in possible inequities among the oldest workers. Report at 15; 1967 Leg. Hist. at 32. Similarly, the Report's discussion of worker benefits identified various factors that might deter hiring employees near retirement. *Id.* ("costs of a typical health and insurance package for a company with a hiring policy that concentrates on younger workers may prove to be less"). However, the Wirtz Report did not express any interest in correcting possible inequities presented by benefit structures which might disadvantage younger older workers in dollar terms - as alleged in this case - rather than in regard to employability. *Id.* at 16, 17; 1967 Leg. Hist. at 33, 34 ("where

---

10/ Likewise, the Report discussed "the development of 'special early retirement' incentive programs," without noting that these generally disfavor the younger portion of workers aged 40 and over. Rather, the Report focused on problems faced by individuals as they grow older, noting that such incentives increase bias against the older portion of the protected class, by "push[ing] downward the age at which employers are willing to employ older workers for new jobs and vacancies." *Id.* at 14; 1967 Leg. Hist. at 31.

benefit formulas are based largely on highest earnings or earnings during the last few years of service, the ultimate pension costs could be greater for newly hired young employees"; "[v]esting would also narrow the present cost [i.e., hiring] advantage that favors younger workers [and benefit inequity that disfavors them] which arises partly because younger workers, without vesting and with greater turnover, often forfeit their pension right").

The legislative record from 1967, including House and Senate Reports on bills essentially the same as the ultimate text of the ADEA, overwhelmingly reflects the concerns and priorities set out in the Wirtz Report. Thus, the record contains nothing to suggest Congress intended to permit claims such as those of Respondent, by workers over age 40 on grounds they were disadvantaged by employers because they were too young. By contrast, the record contains strong signs that Congress intended the ADEA to permit only claims by covered employees who allege that they were injured on account of being too old.

The only major issue concerning treatment of younger workers in the early history of the ADEA concerned proposals to extend the lower limit of employee eligibility to permit suits by stewardesses discharged in their thirties based on rigid age limits, in some cases as low as 32, *because they were too old. See, e.g.*, S. Rep. No. 90-723, at 6-7 (1967); 1967 Leg. Hist. at 110-111; H. R. Rep. No. 90-805, at 6-7 (1967); 1967 Leg. Hist. at 79-80.[11/] Both reports stated the reason for leaving the minimum eligibility age at 40 is a belief that lowering the age limit "would lessen the [bill's] primary objective; that is, the promotion of employment opportunities of older workers." *Id.*

A primary thrust of the 1978 and 1986 Amendments to the ADEA was a loosening, and then elimination of upper age limits on workers' eligibility to assert age discrimination

---

[11/] *See also* H.R. Rep. No. 90-805, *supra*, at 14; 1967 Leg. Hist. at 87 (Supplemental Views of Representatives Thompson, *et al.*) (stewardesses discharged at age 32 because they were considered "too old").

claims. *See* Pub. L. No. 95-256, 92 Stat. 191 (1978) (eliminating maximum age limit on eligibility to assert ADEA claims for most federal workers, and expanding from age 65 to age 70 maximum age limit on eligibility of most other workers); Pub. L. No. 99-592, 100 Stat. 3342 (1986) (eliminating maximum age limit on eligibility of most non-federal workers to assert ADEA claims).

In each instance, Congress discussed in great detail the opportunities for newly eligible workers to combat age discrimination. However, nowhere did Congress address the possibility of claims of "reverse discrimination" on account of age by or against newly eligible workers. Once again, this legislative silence is utterly inconsistent with claims asserted by respondent.

II. THE ADEA DOES NOT PROHIBIT EMPLOYERS FROM ESTABLISHING MINIMUM AGE REQUIREMENTS FOR BENEFITS OR FROM TREATING OLDER MEMBERS OF THE PROTECTED GROUP MORE FAVORABLY.

There is no evidence in either the text or the legislative history of the ADEA that Congress intended the Act to prohibit an employer from setting a minimum age requirement for employee benefits or from treating older members of the protected group more favorably. Many benefits are structured in this fashion, the most common being early retirement incentive plans. However, while the courts[12/] and Congress[13/]

[12/] *See, e.g., Karlen v. City Colleges of Chicago*, 837 F.2d 314, 320 (7th Cir.), *cert. denied*, 486 U.S. 1044 (1988); *Solon v. Gary Comty. Sch. Corp.*, 180 F.3d 844, 852-53 (7th Cir. 1999); *O'Brien v. Board of Educ. of the Deer Park Union Free Sch. Dist.*, 127 F. Supp. 2d 342 (E.D.N.Y. 2001).

[13/] S. 1511 Final Substitute Statement of Managers, 136 Cong. Rec. S13596 (daily ed. Sept. 24, 1990) ("Early retirement incentive plans that withhold benefits to older workers above a specific age while continuing to make them available to younger workers may conflict with the purpose of prohibiting arbitrary age discrimination in employment.").

have consistently condemned early retirement incentive plans that deny benefits to workers above a certain age, it has been undisputed that employers may establish a minimum age for eligibility for such benefits.[14/]

In addition to permitting an employer to establish a minimum eligibility age for benefits, the ADEA also allows employers to extend more favorable treatment to older members of the protected class. As explained in the employee benefits chapter of the EEOC's Compliance Manual, "The Commission's ADEA regulations permit employers to provide *additional benefits to older workers* where the employer has a reasonable basis to conclude that the benefits will counteract problems related to age discrimination." EEOC Compliance Manual § 3 Employee Benefits (2000) (emphasis in original). The referenced regulation states:

> The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination.

29 C.F.R. § 1625.2(b) In response to comments suggesting that this regulation was ambiguous, the EEOC clarified its intent and meaning in detail:

> The proposed interpretation was never intended to sanction discrimination between individuals entitled to the protections of the act. Rather the section was intended to permit an employer to extend additional benefits to older members of

---

14/ *See, e.g., Solon*, 180 F.3d at 851 (explaining that the plan in *Henn [v. National Geographic Society*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987)] was lawful because "Beyond the minimum-age-requirement-something that the ADEA sanctions, *see* 29 U.S.C. § 623(l)(1)(a) - the terms of the plan incorporated no age-based assumptions as to when retirement is 'early' and when it is not; a 75 year old could retire on the same terms as a 55 year old.").

> the protected group in recognition of problems peculiar to those older individuals. The Commission intends that the final interpretation contained in paragraph (b) of this section provide for a continuation of the flexible approach first announced in administrative Opinion Letters of the Department of Labor. Opinion Letter 404 of the Wage-Hour Administrator of the Department of Labor (August 26, 1976) advises that it is permissible to insert contract language which would require that a certain number of positions be made available to an older segment of the protected group. Similarly, Opinion Letter 451 of the Wage-Hour Administrator (January 31, 1978) permits varying amounts of severance pay based, in part, on an employee's age. The basis for both opinion letters was that an employer can take measures to counteract discrimination which is more prevalent against older members of the protected group. The former letter, 404, recognized that an older employee (55 and over) may be a more frequent target of age discrimination, and the latter opinion, 451, recognized that same principle in the context of job relocation. In both instances, the opinions were based on tacit recognition of the fact that age discrimination is frequently more prevalent and more severe against older workers in the protected age group.

Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47724 (Sept. 21,1981) (footnote omitted).

In its Compliance Manual, the EEOC provides the following example of an employer lawfully providing greater benefits to older workers in the protected class:

> Employer Y terminates 30 employees in a reduction-in-force. Eight of the laid-off workers are between 40 and 50 years old, and two

> are 55 years old. Y gives a severance benefit of $1,000 to each of the employees who are 50 or under, and provides a $2,000 severance benefit to each of the 55 year olds. When challenged, Y states that it gave the older workers a higher benefit based on a government study stating that unskilled workers over the age of 50 have a much harder time regaining employment after a lay-off than their younger counterparts. Employer Y has acted to address problems older workers have in obtaining employment and has not violated the ADEA.

EEOC Compliance Manual § 3.[15] Immediately following this example of how providing "better benefits to older workers" does not violate the ADEA, the EEOC concludes by emphasizing that, "*If benefits are lower for older workers, a violation will be found* unless the unequal benefits can be justified." *Id.* (emphasis in original).

As individuals grow older, age discrimination looms as a more significant barrier to securing and retaining employment. The ADEA and the EEOC regulations interpreting the Act permit employers to extend more favorable treatment to older members of the protected class to compensate for the increased obstacles they encounter.

---

[15] While the EEOC's interpretive guidelines do not receive deference under the Court's decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *see EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991), such interpretations are "'entitled to respect' under the Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also Clackamas Gastroenterology Assoc. v. Wells*, 123 S. Ct. 1673, 1680 (2003).

III. ALLOWING INDIVIDUALS TO BRING CLAIMS UNDER THE ADEA THAT THEY WERE DISCRIMINATED AGAINST BECAUSE OF THEIR YOUTH WILL UNDERMINE THE VERY SPIRIT AND PURPOSE OF THE ACT.

Allowing claims for discrimination based on youth belittles the plight of older workers and will undermine the effectiveness of the ADEA in eliminating the serious problems that still plague older workers in their efforts to obtain and to retain employment in a youth-oriented society.

The ADEA was enacted because of our society's enchantment with youth. In the words of Senator Yarborough, one of the ADEA's sponsors:

> The accent on youth - almost a cult in this nation - understandable as it is in such a fast-moving era has nonetheless given rise to the wholly fallacious, yet widely held belief, that older persons are unqualified, or less qualified to perform many tasks in this technological age.

Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong. 23 (1967) (statement of Sen. Jacob K. Javits).[16] This is what older workers faced when the ADEA was enacted over 35 years ago and, unfortunately, it has not changed.[17] There is still an unfounded and unfair premium on youth in our society and, accordingly it is imperative that the

---

[16] "This present age has been called on (sic) age where the cult of youth seems to prevail over everything else." *Id.* at 28.

[17] "The pervasive belief that all abilities decline with age has fostered the myth that older workers are less efficient than younger workers. Since younger workers, rather than older workers, tend to receive the skills and training needed to keep up with technological changes, the myth continues." Senate Special Comm. On Aging, Developments in Aging: 1996, S. Rep. No. 105-36, at 7 (1996).

Court confirm that the purpose of the ADEA is to protect individuals as they grow older from being arbitrarily judged based on their age and not their ability. It is also critical that the Court reaffirm that the ADEA does not prohibit employers from extending more favorable treatment to older members of the ADEA's protected class in recognition of the detrimental effects of our society's inclination to place a premium on youth.

CONCLUSION

For the foregoing reasons, AARP requests that the Court reverse the judgment of the Sixth Circuit.

July 7, 2003

Respectfully submitted,

Laurie A. McCann*
Daniel B. Kohrman
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for *Amicus Curiae*
AARP

*Counsel of Record

No. 02-1080

JUL 7 2003

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, THE HR POLICY ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES, AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae* The Chamber of Commerce of the United States

ANN ELIZABETH REESMAN
DANIEL V. YAGER
KATHERINE Y.K. CHEUNG
Counsel of Record
TIMOTHY J. BARTL
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amici Curiae* Equal Employment Advisory Council and LPA, the HR Policy Association

July 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

LYNN D. DUDLEY
Vice President and Senior Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

Attorney for *Amicus Curiae*
American Benefits Council

CATHERINE L. CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230

Attorney for *Amicus Curiae*
American Benefits Council

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE ADEA DOES NOT SUPPORT A CLAIM FOR "REVERSE" AGE DISCRIMINATION	6
A. The ADEA's Plain Language Precludes Reverse Discrimination Claims	6
1. The ADEA's statutory language prohibits only discrimination against older employees	6
2. An employer that favors older employees has not discriminated based on age under the plain language of the ADEA	8
3. The EEOC's regulation on comparative age warrants no deference because it is fundamentally inconsistent with both the plain language of the ADEA and the next section of the regulation	10
B. Reverse Discrimination Claims Are Fundamentally Incompatible With The ADEA's Legislative History, Which Focuses On The Particular Problems Faced By Older Employees Relative To Younger Ones	11

TABLE OF CONTENTS—Continued

Page

C. The Negative Stereotypes That Congress Intended The ADEA To Combat Are Absent In Employment Actions That Benefit Older Workers 15

II. THE DECISION BELOW SEVERELY PREJUDICES EMPLOYERS BY SUBJECTING THEM TO SIGNIFICANTLY MORE, AND POTENTIALLY CONFLICTING, DISCRIMINATION´ CLAIMS OVER PERSONNEL ACTIONS 16

III. THE DECISION BELOW JEOPARDIZES EMPLOYER-SPONSORED BENEFIT PLANS 20

A. Employers Need Flexibility To Offer Enhanced Welfare Benefits To Workers Who Need Them The Most 20

1. Employers commonly offer enhanced welfare benefits to older employees 20

2. Limiting an employer's flexibility to offer enhanced welfare benefits to older employees may result in an overall reduction of benefits 21

B. Allowing Reverse Age Discrimination Claims Could Negatively Impact Employee Benefit Pension Plans 22

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES Page

EEOC v. Wyoming, 460 U.S. 226 (1983) 13

Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992) 8, 9, 10

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 15, 19

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 7, 8

Paquin v. Federal National Mortgage Association, 119 F.3d 23 (D.C. Cir. 1997) 15, 16

Parker v. Wakelin, 882 F. Supp. 1131 (D. Me. 1995) 9

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 10

Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988) 9

Sitko v. Goodyear Tire & Rubber Co., No. 02-4083 (6th Cir.) 19

Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000) 19

Stone v. Travelers Corp., 58 F.3d 434 (9th Cir. 1995) 9

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) 6

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 18

United States v. Mead Corp., 533 U.S. 218 (2001) 11

Walton v. McDonnell Douglas Corp., 981 F. Supp. 1273 (E.D. Mo. 1997), *aff'd*, 17 F.3d 423 (8th Cir. 1999) 9

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES — Page

Age Discrimination in Employment Act,
29 U.S.C. §§ 621 *et seq.* ..... *passim*
29 U.S.C. § 621 6
29 U.S.C. § 623(l)(1)(A) 23
Internal Revenue Code
26 U.S.C. § 401(a)(28)(B)(iii) 23
Older Workers Benefit Protection Act of 1990, P.L. 101-433 12
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 16, 17

FEDERAL REGULATIONS

26 C.F.R. § 1.401(a)(4)-8(b) 23
29 C.F.R. § 1625.2 11
29 C.F.R. § 1625.2(a) 10, 11
29 C.F.R. § 1625.2(b) 11

LEGISLATIVE HISTORY

133 Cong. Rec. H16,170 (daily ed. Dec. 4, 1967) 12
136 Cong. Rec. H8614 (daily ed. Oct. 2, 1990) 12
H.R. Rep. No. 90-805, *reprinted in* 1967 U.S.C.C.A.N. 2213 ..... 11, 12

MISCELLANEOUS

AARP, *Update on the Older Worker: 2001* (Apr. 2002) 14
The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey (Dec. 2002) 21, 22

TABLE OF AUTHORITIES—Continued

Page

Employment Policy Found., Tabulation of Bureau of Labor Statistics data gathered by the United States Dep't of Labor, Employment & Training Administration and reported in "Worker Displacement 1991-2001" (Aug. 21, 2002) 14
Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002) 14, 17
United States Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-219 (1965) 13, 14

IN THE

Supreme Court of the United States

No. 02-1080

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, THE HR POLICY ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES, AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council, LPA, the HR Policy Association, The Chamber of Commerce of the United States, and the American Benefits Council respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

urges this Court to reverse the decision below, and thus supports the position of the petitioner, General Dynamics Land Systems, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 340 of the nation's largest private sector corporations, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, the HR Policy Association ("LPA"), is a public policy advocacy organization representing corporate executives responsible for human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion about current situations and emerging trends in labor and employment policy. LPA members are typically companies with business operations in the United States that have more than $750 million in revenues and more than 2,500 employees. The total number of persons employed by LPA member companies in the United States is nearly 13 million Americans, more than 12 percent of the private sector workforce. A large share of LPA members currently provide retiree health care for their employees. In light of rapidly increasing health care costs, LPA has a keen

interest in ensuring that employers have sufficient flexibility with respect to health benefits, thus enabling them to provide some measure of coverage in the future.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The American Benefits Council ("ABC") is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, ABC members either sponsor or provide services to retirement and health plans covering more than 100 million Americans.

All of EEAC's and LPA's, and many of the Chamber's and ABC's members, are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, *amici's* members have a strong interest in the issue presented for the Court's consideration—whether the ADEA provides a cause of action for "reverse" discrimination for someone who claims that an older worker was treated more favorably.

Thus, *amici* seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the parties have not raised. Because of their experience in these matters,

amici are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Under the collective bargaining agreement negotiated between petitioner General Dynamics Land Systems, Inc. ("General Dynamics") and the United Auto Workers ("UAW") that was in effect prior to July 1, 1997, General Dynamics provided full health insurance benefits to retired workers with 30 years of seniority. Petitioner's Appendix, at 3a. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement, which obligated General Dynamics to offer retiree health benefits only to employees who were at least 50 years old as of July 1, 1997, the date the new agreement took effect. *Id.*

The respondents are current and former employees of General Dynamics who were between 40 and 50 years old on July 1, 1997. *Id.* Each of the respondents would have been eligible for retiree health benefits under the collective bargaining agreement in effect before July 1, 1997, but did not qualify for benefits under the new agreement. *Id.* Respondents sued General Dynamics, alleging that limiting the availability of retiree health benefits to employees 50 years old and over constituted age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*

The United States District Court for the Northern District of Ohio dismissed respondents' complaint. The district court reasoned that an allegation that older workers received more favorable treatment than younger workers was a claim for "reverse" age discrimination, which was not actionable under the ADEA. Pet. App. 4a. A divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed. In the majority's view, the ADEA bars employment discrimination against any

individual 40 or older on the basis of age, regardless of whether older or younger workers received more favorable treatment. Petitioner sought and was granted this Court's review of the Sixth Circuit's decision.

SUMMARY OF ARGUMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, does not support a claim for "reverse" age discrimination for someone who claims that a comparatively older worker was treated more favorably. By referring specifically to the problems faced by "older workers," particularly in relation to younger employees, the plain language of the statute precludes reverse discrimination claims. Therefore, an employer that favors older employees has not discriminated on the basis of age. The Sixth Circuit's interpretation of the statute and an Equal Employment Opportunity Commission (EEOC) regulation on comparative age to permit a claim of reverse age discrimination conflicts with the plain language of the statute. Moreover, the EEOC's regulation on comparative age is fundamentally inconsistent with both the statutory language and the next section of the regulation, and therefore deserves no deference from this Court.

Reverse discrimination claims also are incompatible with the ADEA's legislative history, which reveals an intent to promote employment opportunities for *older* workers vis-à-vis younger ones in light of the harmful and inaccurate stereotypes about the declining work capabilities associated with advancing age. The problems and stereotypes that older employees reportedly continue to experience in some workplaces thirty-five years after the passage of the ADEA further support interpreting the statute to prohibit only situations in which older workers are discriminated against in favor of younger ones. Moreover, employment actions that favor older workers are not based on the negative stereotypes against older workers that Congress intended the ADEA to combat.

As a practical matter, the decision below severely prejudices employers by subjecting them to significantly more, and potentially conflicting, discrimination claims over personnel actions. At the same time, it significantly weakens their ability to defend against such claims. The Sixth Circuit's ruling also jeopardizes employer-sponsored benefit plans. By removing the flexibility employers need to manage benefit programs in light of escalating costs, the decision below may force employers to reduce or eliminate completely many benefits that they voluntarily make available to their workers, an undesirable result for all workers, regardless of their age.

ARGUMENT

I. THE ADEA DOES NOT SUPPORT A CLAIM FOR "REVERSE" AGE DISCRIMINATION

A. The ADEA's Plain Language Precludes Reverse Discrimination Claims

1. The ADEA's statutory language prohibits only discrimination against older employees

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, prohibits employment discrimination against older workers who are age 40 and above on the basis of their age. The plain language of the ADEA indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored. In the congressional statement of findings and purpose at the beginning of the ADEA, Congress specifically referred to the problems faced by "older workers" and "older persons," particularly "relative to the younger ages" as the motivation for the statute. 29 U.S.C. § 621. This language memorialized Congress's intent to protect workers who were discriminated against *because they were considered too old*, not too young. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (1999) (relying on

legislative findings enacted as part of the Americans with Disabilities Act to show congressional intent).

These statements of legislative findings demonstrate that Congress did not intend to allow *every* worker age 40 and over to claim age discrimination simply because she or he is a member of the ADEA-protected class. Rather, the statute prohibits employers from arbitrarily favoring younger workers over older ones based on inaccurate and harmful stereotypes that as individuals age, they become less able in the workplace.

The ADEA's language protecting "older employees" thus is a comparative term, not an absolute one. Interpreting this term, this Court ruled in its unanimous opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), that the appropriate test for illegal age discrimination under the ADEA is the replacement of the plaintiff by someone who is *substantially younger*, but who need not be outside the protected class, *i.e.*, under 40 years of age. "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id.* at 313.

The Court observed that a test which merely looked at whether or not the comparator is in the protected class would permit a 40-year-old plaintiff who is replaced by a 39-year-old to claim age discrimination simply because the plaintiff is one year older. In practice, the Court said, this type of case was rare, "since the vast majority of age-discrimination claims come from *older employees*." *Id.* at 312 (emphasis added). Nevertheless, the Court rejected this standard as a reliable indicator of age bias.

Requiring a comparison to a substantially younger worker to establish a prima facie case of age discrimination thus

shows that the term "older employee" means *older than the comparator*. The Court's distinction between 40-year-olds, who are part of the ADEA's protected class, and "older employees" also shows that the word "older" is a comparative term. "Older" refers to one's age when compared to someone else's, not just to one's chronological age. The Court's focus in *O'Connor* on the plaintiff's older age relative to his replacement thus shows that the plain language of the ADEA requires the discrimination to be in favor of someone *younger* than the plaintiff to be unlawful. The absence of this essential point in the decision below warrants reversal.

2. An employer that favors older employees has not discriminated based on age under the plain language of the ADEA

Relying on the plain language of the ADEA, the Seventh Circuit ruled in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), that the statute does not support a claim for reverse age discrimination. In that case, Caterpillar offered early retirement benefits to workers who were either 60 years or older with 10 years of service, or 55 years or older, if the sum of their years of service and age totaled 85. Caterpillar later modified this plan to extend early retirement benefits also to workers who were 50 years or older with 10 years of service. *Id.* at 1227.

A group of former employees between the ages of 40 and 50 years old who had more than 10 years of service sued Caterpillar for reverse age discrimination because they were *too young* to qualify for the benefits. *Id.* In rejecting the plaintiffs' claims, the Seventh Circuit ruled that the plain language of the ADEA indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored.

> [T]he phrase "arbitrary age discrimination" refers to Congress's understanding that discriminating against *older people* on the basis of their age is arbitrary . . . Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young . . . cannot argue that they are similarly victimized.

Id. at 1228 (citation omitted).

The First Circuit's ruling in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988), also supports reversal of the decision below. In that case, the First Circuit rejected a worker's claim that a company severance plan, which gave greater benefits to workers with more seniority, violated the ADEA by inducing him to resign.

In an opinion written by then-Judge Breyer, the First Circuit held that the ADEA "does not forbid treating older persons *more* generously than others." *Id.* at 278. The court explained that a company severance incentive package that offered increased benefits to employees with more seniority who resigned voluntarily was a *favor* to them, and thus could not support an age discrimination claim. "That plan was a carrot, not a stick, and . . . a 'carrot' cannot ordinarily violate the Age Discrimination in Employment Act." *Id.* (citation omitted); *see also Walton v. McDonnell Douglas Corp.*, 981 F. Supp. 1273, 1278 n.6 (E.D. Mo. 1997) ("Because the law does not protect employees because they are too young, plaintiff cannot prove age discrimination based upon defendant's retention of older individuals"), *aff'd*, 17 F.3d 423 (8th Cir. 1999); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995) (dismissing ADEA reverse age discrimination lawsuit by teachers between ages of 40 and 50, who were too young to vest in retirement benefits).

In addition, the Ninth Circuit expressed considerable doubt that the ADEA supports a claim for reverse age discrimination in *Stone v. Travelers Corp.*, 58 F.3d 434 (9th Cir. 1995). In that case, a company severance plan permitted only employees over the age of 55 to receive their benefits as a

lifetime annuity. The plaintiff, who was 52 years old, claimed discrimination because he was too young to receive an annuity. Although the Ninth Circuit did not rule on the viability of the plaintiff's reverse age discrimination claim, it described the nature of his claim with disbelief: "Stone claims that Travelers violated the ADEA by discriminating against him because he was too young!" *Id.* at 437. These decisions support the conclusion that a reverse age discrimination claim is not cognizable under the plain language of the ADEA, thereby requiring reversal of the decision below.

3. The EEOC's regulation on comparative age warrants no deference because it is fundamentally inconsistent with both the plain language of the ADEA and the next section of the regulation

The Seventh Circuit in *Hamilton* also properly rejected a regulation promulgated by the Equal Employment Opportunity Commission (EEOC) at 29 C.F.R. § 1625.2(a) that purportedly interprets the ADEA as supporting a claim for reverse age discrimination, because it conflicted with the statute. 966 F.2d at 1228. Subsection (a) states that "It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age . . . ." 29 C.F.R. § 1625.2(a). This provision is contrary to the plain language of the statute, which indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored. *See Section I.A., supra.* As this Court held in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989), "no deference is due to agency interpretations at odds with the plain language of the statute itself."

Moreover, interpreting this subsection to authorize reverse age discrimination suits impermissibly creates a conflict with the next section of the regulation. The regulation's apparent prohibition against any preferences for older workers conflicts directly with § 1625.2(b), which provides that "[t]he extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination." 29 C.F.R. § 1625.2(b). In contrast to § 1625.2(a), the next part of the regulation asserts that there are some situations, particularly in the context of employer-provided benefits, in which it is perfectly appropriate for employers to single out older workers to receive enhanced benefits. The fundamental inconsistency between the two sections in § 1625.2 thus creates a great deal of uncertainty for employers as to whether they lawfully may offer additional benefits to older workers. The confusion makes § 1625.2(a)'s statements against any preferences for older employees inherently unpersuasive, thereby precluding any deference from this Court to them. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (consistency and persuasiveness of agency's position are two factors relevant to determining amount of deference courts should give).

B. Reverse Discrimination Claims Are Fundamentally Incompatible With The ADEA's Legislative History, Which Focuses On The Particular Problems Faced By Older Employees Relative To Younger Ones

The legislative history of the ADEA is replete with explanations that the purpose of the bill was to promote employment opportunities for *older* workers.[2] The congres-

---

[2] *See, e.g.*, H.R. Rep. No. 90-805, at 4, 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214-17.

sional debate accompanying passage of the ADEA reveals the intent to combat inaccurate and harmful stereotypes of an older worker as "an inflexible person, in physical decline, capable of only low productivity, [which] bars the employer from a fair evaluation of the applicant's actual ability and performance record." 133 Cong. Rec. H16,170 (daily ed. Dec. 4, 1967) (statement of Rep. Olsen).

In fact, Congress deliberately chose not to establish an age threshold lower than 40 for membership in the protected class. Congress specifically felt "a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers." H.R. Rep. No. 90-805, at 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219. By recognizing reverse discrimination claims under the ADEA, the decision below similarly frustrates the primary goal of the ADEA to protect older workers and must be reversed.

Subsequent amendments to the ADEA further evidence the intent to protect older workers from discrimination in favor of younger employees. When Congress amended the ADEA by passing the Older Workers Benefit Protection Act of 1990 (OWBPA), P.L. 101-433, it was understood that the ADEA did not require employers to provide the same benefits for younger workers in the ADEA-protected class as older workers. For example, in describing a "wide variety" of early retirement incentives that were lawful under the ADEA even prior to the OWBPA amendments, the Statement of Managers that accompanied the Act noted that the ADEA allows "a plan that gives employees who have attained age 55 and who retire during a specified window period credit for 5 additional years of service and/or age . . . ." 136 Cong. Rec. H8614, H8619 (daily ed. Oct. 2, 1990) (Statement of Managers). The example is premised on the interpretation that the ADEA allows an employer to limit employee benefit enhancements to workers who are age 55 and older. In contrast, the Sixth Circuit's

interpretation would require that benefits be uniform for all workers in the ADEA-protected class. This result is inapposite with the ADEA's legislative history demonstrating Congress's intent to protect older workers from employment discrimination because of the negative stereotypes associated with their advancing age, stereotypes that are absent when an employee is considered too *young*.

Moreover, the extensive legislative history on which this Court relied in *EEOC v. Wyoming*, 460 U.S. 226 (1983), to hold that the ADEA covered state and local governments also supports the proposition that the ADEA was designed to protect "older" workers vis-à-vis younger ones. The Court specifically cited with approval the findings of a 1965 report by then-Labor Secretary W. Willard Wirtz on older American workers that showed age discrimination "was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. . . ." *Id.* at 231.[3]

The Secretary's Report detailed the problems facing older workers in the U.S., where over half of all employers used an age ceiling from 45 to 55 when hiring new employees, regardless of the applicant's qualifications, and workers over 55 years of age were automatically excluded from over one half of all job openings in private companies. Secretary's Report, at 6. The Secretary also noted that workers age 45 and over were unemployed for eight weeks longer than workers under age 45. *Id.* at 18. The Secretary's conclusion

---

[3] United States Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-219 (1965) (hereinafter cited as "Secretary's Report").

that workers were having more difficulty obtaining new jobs as they grew older thus was a compelling reason for enacting the ADEA.

The same concerns that underlay the Secretary's Report in 1965 remain valid for older workers today. According to AARP, older workers, defined as those aged 55 and above, typically continue to take longer than younger employees to find a job. AARP, *Update on the Older Worker: 2001* (Apr. 2002).[4] More specifically, job seekers aged 50 and over took on average *50% longer* to find a new job in 2002 than workers under the age of 50.[5] Moreover, even when older workers found another job, they were more likely to suffer a pay cut than younger employees. While close to 55% of workers younger than age 55 found another job in which they earned the same or more than in their previous position, only 47% of workers age 55 or older could say the same.[6] These data confirm that "older" workers continue to experience more problems in the workplace than younger ones, and thus support the ongoing need to interpret the ADEA to prohibit only situations in which older workers are discriminated against in favor of their younger colleagues.

[4] The report is available at *http://www.research.aarp.org/econ/dd69_worker.html*.

[5] Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002) (micro-data records public use file available at *http://www.bls.census.gov/cps/cpsmain.htm*).

[6] Employment Policy Found., Tabulation of Bureau of Labor Statistics data gathered by the United States Dep't of Labor, Employment & Training Administration and reported in "Worker Displacement 1991-2001" (Aug. 21, 2002).

C. The Negative Stereotypes That Congress Intended The ADEA To Combat Are Absent In Employment Actions That Benefit Older Workers

This Court explicitly recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that Congress intended the ADEA to protect older workers from inaccurate and damaging stereotypes about their ability to work. In *Hazen Paper*, the Court explained that "the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." 507 U.S. at 610 (citation omitted).

This Court therefore ruled in *Hazen Paper* that an employer's termination of an employee to prevent his pension benefits from vesting was lawful under the ADEA, because the termination was not based on negative stereotypes about older workers. The absence of the offensive stereotype against older workers thus meant the employer's conduct did not violate the ADEA. "The prohibited stereotype ('Older employees are likely to be ___') would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age . . . ." *Id.* at 612.

Likewise, an employer that favors older workers over younger ones is not acting based on inaccurate and negative stereotypes about older workers, and therefore also has not violated the ADEA. For this reason, the D.C. Circuit has refused to infer unlawful age bias when a plaintiff failed to show that a challenged employment decision was based on disparaging stereotypes about older workers. In *Paquin v. Federal National Mortgage Association*, 119 F.3d 23 (D.C. Cir. 1997), the D.C. Circuit rejected the plaintiff's claim that

his employer's criticism that he lacked creativity and was stubborn was evidence that he was terminated based on his age. As the court noted, those opinions were not based on negative stereotypes about older workers. 119 F.3d at 31. As such, "a decision not 'derived from stereotypical preconceptions about older people[],' does not support an inference of age discrimination. . . . To prevail, Paquin must present evidence that the statements in fact spring from stereotypes." *Id.* (internal citation omitted).

In this case, the lower court's decision that the ADEA supports a claim for reverse age discrimination fails to advance the rationale behind the ADEA of combating the harmful stereotypes that plague older workers. By prohibiting an employer from favoring older employees over younger ones, the decision below leaves intact the erroneous and damaging preconception that their advancing age makes older workers less productive and valuable in the workplace, the precise evil that the ADEA was intended to eliminate. Because the decision below ignores the language and purpose of the ADEA, it must be reversed.

II. THE DECISION BELOW SEVERELY PREJUDICES EMPLOYERS BY SUBJECTING THEM TO SIGNIFICANTLY MORE, AND POTENTIALLY CONFLICTING, DISCRIMINATION CLAIMS OVER PERSONNEL ACTIONS

The Sixth Circuit's decision will increase significantly the pool of potential claimants alleging age discrimination, and thus the number of claims to which employers must respond. Unlike the immutable characteristics covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, age is a progressive condition that affects everyone. Most workers eventually will attain the age of 40, joining the growing class of individuals protected under the ADEA. On average, 11,684 people (5816 men and 5868 women) in the United

States will turn 40 every day in 2003.[7] By expanding the ADEA to include reverse age discrimination claims, the Sixth Circuit allows every one of these workers to look at their older coworkers in addition to younger ones as potential comparators, vastly increasing the number of potential claims they can make.

Collectively, *amici's* member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with Title VII, the ADEA, and other applicable legal requirements.

Nevertheless, each employment transaction involving a worker who is age 40 or over is a potential subject of a discrimination charge and/or lawsuit. This prospect is true because each time an employer makes a decision to hire an applicant or promote an employee, for example, there is likely to be at least one candidate who was not selected for the job. In many cases, there will be several candidates who have been rejected. If a candidate is substantially older than the individual selected, the candidate probably can establish a prima facie case of age discrimination. The decision below allows candidates who are substantially *younger* than the person selected also to establish a prima facie case of age discrimination as well, thereby vastly increasing the number of individuals who may claim unlawful age discrimination.

Thus, following every hiring decision, every candidate who was not selected can identify a comparator who is *either* older

---

[7] Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002) (microdata records public use file available at *http://www.bls.census.gov/cps/cpsmain.htm*).

or younger, and was treated differently. That means that virtually every plaintiff will be able to establish a prima facie case of discrimination, thereby shifting the burden to the employer to articulate a legitimate, nondiscriminatory reason for the employment action that the plaintiff may attempt to show is a pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The decision below could lead to absurd results. For example, an employer that hires a 50-year-old from a pool of applicants of various ages may receive multiple claims of age discrimination, all challenging a single employment action. Some plaintiffs may allege they were not hired because they were too old, while others claim they were rejected because they were too young. As long as a substantial age difference existed between the person selected and the plaintiff, both older and younger plaintiffs probably would establish a prima facie case of age discrimination. Thus, an employer could be sued for discriminating against both older and younger applicants at the same time.

Although the prima facie test is not an onerous one, it does weed out clearly unmeritorious claims. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under the Sixth Circuit's ruling, however, a prima facie case would exist every time any comparator was either substantially younger *or older* than the plaintiff. Unless this Court reverses the decision below, employers will be forced to defend themselves against significantly more age discrimination complaints. While these employers ultimately may be able to articulate legitimate, nondiscriminatory reasons for their employment actions, they still must undergo a lengthy and expensive process to refute each charge of discrimination.

Moreover, as a practical matter, the Sixth Circuit's decision effectively eliminates an important defense for employers to an age discrimination suit. One way an employer may defend

against a claim under the ADEA that it discriminated against an older worker because of his age is to show that it actually treated the older worker *better* than a younger one. In *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420 (4th Cir. 2000), for example, the Fourth Circuit held the employer did not violate the ADEA by requiring the 56-year-old plaintiff to choose between receiving a lump-sum severance payment or a special retirement option as part of a lay off. As the court pointed out, the plaintiff was treated *better* than his younger coworkers, who received only the severance benefit. *Id.* at 426.

While this defense may defeat the older worker's age discrimination claim, it also would *prove* a reverse discrimination claim by a younger employee who is within the ADEA-protected class under the Sixth Circuit's decision. The potential liability for reverse age discrimination created by this defense may lead employers to forsake the defense completely.[8] This Court must reverse the decision below to

---

[8] The Sixth Circuit's recognition of a cause of action for reverse age discrimination poses problems not only for employers defending against disparate treatment cases, but also where a plaintiff alleges a disparate impact based on age. This Court has never recognized that a disparate impact cause of action exists under the ADEA. *Hazen Paper*, 507 U.S. at 610. Likewise, the Sixth Circuit has not ruled on the viability of a disparate impact claim under the ADEA. That court, however, is currently considering on appeal a case that raises this issue. *Sitko v. Goodyear Tire & Rubber Co.*, No. 02-4083 (6th Cir.).

If the Sixth Circuit were to rule that disparate impact claims are cognizable under the ADEA, allowing "reverse" age discrimination would only complicate matters. To monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, both older and younger. This analysis would be overly burdensome on employers, and ultimately meaningless. Since the age of the employee population is constantly changing, developing an accurate picture of the effect of a particular employment practice on employees of different ages will be impossible.

avoid subjecting employers to an increased number of, and potentially conflicting, age discrimination claims and curtailing their ability to defend against these claims.

III. THE DECISION BELOW JEOPARDIZES EMPLOYER-SPONSORED BENEFIT PLANS

A. Employers Need Flexibility To Offer Enhanced Welfare Benefits To Workers Who Need Them The Most

1. Employers commonly offer enhanced welfare benefits to older employees

The decision below jeopardizes the operation of employee benefit plans offered by *amici's* member companies. The most profound effect of the Sixth Circuit's ruling would arise under employer welfare arrangements, including retiree health programs. The ruling calls into question common employer practices that benefit the oldest workforce employees. For example, employers may provide enhanced welfare benefits (such as severance pay or medical coverage) to older employees in the ADEA-protected class when there is a reduction in the workforce or a fundamental change in the employer's benefit program. An employer that has a reduction in force might provide a higher level of subsidy or enhancement in medical coverage to older departing employees, *e.g.*, age 50 or older, in an effort to help bridge these workers until they become eligible to receive pension benefits or Medicare coverage. Like General Dynamics, employers forced to reduce future retiree health benefits may elect to keep the same level of retiree health benefits or provide a better transition benefit for older employees while applying the new terms to all other workers.

The employer's decision to provide greater benefits to those workers who are at or closest to retirement age recognizes that, as a practical matter, older workers may be impacted more significantly by benefit changes. Workers on

the cusp of pension eligibility may have begun to plan their retirement in anticipation of receiving retiree medical coverage. While such voluntary enhancements or transition benefits are highly beneficial to older workers, they would appear to be unlawful under the Sixth Circuit's ruling.

2. Limiting an employer's flexibility to offer enhanced welfare benefits to older employees may result in an overall reduction of benefits

If the Sixth Circuit's ruling stands, it could have the perverse effect of further reducing the availability of retiree health benefits for all workers. A 2002 nationwide survey of 435 large employers revealed that the cost of providing retiree health benefits increased an estimated 16% from the previous year, from $12.5 billion in 2001 to an estimated $14.5 billion in 2002. *The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey* (Dec. 2002) (hereinafter referred to as the "Kaiser/Hewitt Survey").[9] Together, these employers offer health benefits to approximately 18.5 million workers and family members and 5.4 million retirees and family members. *Id.* at 58. For them, the increase in the cost of providing retiree health benefits outpaced that of providing health benefits to active workers. *Id.* at 10. Rising costs already have caused some employers with fixed budgets to modify their retiree health coverage. Over the past few years, many large employers already have raised retiree contributions to premiums and the amounts of the insureds' deductibles and co-payments. *Id.* at 37-38.

The increased likelihood that employers will face lawsuits under the ADEA over *any* differential in their benefit plans, including those that actually favor their oldest workers, will

---

[9] The survey is available at *http://www.kff.org/content/2002/20021205a/6061v4.pdf.*

exacerbate the pressure to control cost by eliminating these programs altogether. Even if the employer ultimately prevails, mounting a defense to an ADEA lawsuit can be prohibitively expensive.

No federal law requires employers to provide workers with pension or health benefits, or prevents them from reducing or eliminating completely such benefits. However, many employers voluntarily choose to provide such benefits to their workers as a perquisite of employment. To minimize the risk of lawsuits under the ADEA, prudent employers simply may choose not to offer benefits that are likely to be challenged, such as retiree health insurance. In fact, 13 percent of the large employers surveyed already have terminated health benefits for *future* retirees (often new or recent hires) in the past two years, and 22 percent predicted that they were likely to do the same in the next three years. *Kaiser/Hewitt Survey*, at 37, 43. By exposing employers that provide retiree health benefits to greater risk of litigation, the decision below may drive more employers to scale back further their coverage or abandon it altogether. This action would make it significantly harder for older individuals to obtain adequate health insurance coverage. Since older workers often must pay significantly higher premiums for coverage under individual health insurance policies than under an employer's group health plan, some individuals may find the insurance prohibitively expensive, forcing them to become uninsured. To avoid dramatically increasing the number of uninsureds in this country, this Court must reverse the decision below to preserve an employer's flexibility to manage its voluntary benefits programs.

B. Allowing Reverse Age Discrimination Claims Could Negatively Impact Employee Benefit Pension Plans

While the Sixth Circuit's ruling affects retiree health and employer welfare plans most dramatically, *amici*'s member

companies also have concerns about the operation of their employee benefit pension plans if reverse age discrimination is a cognizable claim under the ADEA. Under current law, section 623(l)(1)(A) of the ADEA allows employee benefit pension plans to condition the payment of normal or early retirement benefits on the attainment of a certain age. 29 U.S.C. § 623(l)(1)(A). Presumably, this specific exception for pension plans would not be affected by the Sixth Circuit's ruling.

Retirement plans may include other provisions contingent upon age, however, that may not be covered by the exception in § 623(l). For example, in defined contribution plans, such as a "401(k)" or similar arrangements, some plans may limit the ability to take in-service withdrawals before retirement to participants who have attained age 50 or above. Another example is the Internal Revenue Code provision requiring certain tax-qualified plans holding employer securities to allow participants who have attained age 55 and have 10 years of participation to diversify the assets in which their accounts are invested. 26 U.S.C. § 401(a)(28)(B)(iii). There may be uncertainty as to whether a plan that incorporates the Internal Revenue Code § 401(a)(28) rule violates the ADEA by not providing similar diversification rights to younger workers in the ADEA-protected class.

In addition, the Sixth Circuit's ruling also casts doubt on another common practice that is recognized by Treasury Department regulations. Many defined contribution plans (including target benefit plans) are "age-weighted" so that larger contributions are made for older participants than for similarly-situated younger employees. *See, e.g.*, 26 C.F.R. § 1.401(a)(4)-8(b). Whether plans that contain this feature unlawfully discriminate against younger workers in the ADEA-protected class is also unclear under the Sixth Circuit's decision.

If, as the Sixth Circuit's rulings suggests, the benefits, rights, and features in employee benefit plans must be

uniform for all employees age 40 and over, numerous plan designs that have long been assumed to be lawful under the ADEA now would need to be reconsidered. As with retiree health plans, employers voluntarily offer pension plans to their employees as an added benefit of employment. The risk that an employer may be sued over one of these pension plan arrangements, however, may cause it to cut back or eliminate the program all together. The end result may be a diminution of the benefits that are provided to the oldest employees in the workforce, a perverse outcome under a statute that was intended to protect older employees. This Court must reverse the Sixth Circuit's decision to avoid inadvertently causing a reduction in the benefits that employers voluntarily make available to older workers, which would only compound the problems that older workers face in the workplace.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States

ANN ELIZABETH REESMAN
DANIEL V. YAGER
KATHERINE Y.K. CHEUNG
Counsel of Record
TIMOTHY J. BARTL
MCGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W.,
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amici Curiae*
Equal Employment Advisory
Council and LPA, the HR
Policy Association

LYNN D. DUDLEY
Vice President and Senior
Counsel
AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

Attorney for *Amicus Curiae*
American Benefits Council

July 2003

CATHERINE L. CREECH
DAVIS & HARMAN, LLP
1455 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004
(202) 347-2230

Attorney for *Amicus Curiae*
American Benefits Council

(10)

Supreme Court, U.S.
FILED
JUL 7 - 2003
OFFICE OF THE CLERK

No. 02-1080

In The

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,

Petitioner,

v.

DENNIS CLINE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CAROLINE M. BROWN
Counsel of Record
JOHN M. VINE
AIMEE FEINBERG
MICHAEL L. HADLEY
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

JULY 7, 2003

28 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. FEDERAL LAWS GOVERNING EMPLOYEE BENEFITS MAKE THE KIND OF AGE-BASED DISTINCTIONS THAT WOULD BE UNALLOWABLE IF THE ADEA PROHIBITED "REVERSE" DISCRIMINATION 4

II. CONGRESS DID NOT INTEND THE ADEA TO PROHIBIT THE TYPE OF PRACTICE THAT IT HAS EXPRESSLY ENDORSED IN ERISA AND THE TAX CODE 11

A. The ADEA Should Be Read In Harmony With The Approach Taken In ERISA And The Tax Code, Not Placed In Conflict With It 11

B. A "Reverse" Discrimination Interpretation Of The ADEA Undermines the Statute's Purpose By Jeopardizing Employee Benefit Programs That Are Advantageous To Older Workers 15

CONCLUSION 21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Black & Decker Disability Plan v. Nord, 123 S. Ct. 1965 (2003) 2

Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466 (6th Cir. 2002) 12, 13, 14

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 2

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 2

J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124 (2001) 11

Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995) 5

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 2

Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 2

Morton v. Mancari, 417 U.S. 535 (1974) 11

O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) 14

FEDERAL STATUTES AND REGULATIONS

26 U.S.C. § 72(t) 5

26 U.S.C. § 72(t)(2)(A)(i) 5

26 U.S.C. § 72(t)(2)(A)(v) 5

26 U.S.C. § 132(h)(1) 18

26 U.S.C. § 401(a)(9), *amended by* Pub. L. No. 104-188 § 1404(a), 110 Stat. 1755 (1996) 7

26 U.S.C. § 401(a)(9)(C)(iii) 7

26 U.S.C. § 401(a)(14) 6, 10

26 U.S.C. § 401(a)(28) 5, 11, 12

26 U.S.C. § 401(a)(30) 8

26 U.S.C. § 401(h) 18

26 U.S.C. § 401(k)(2)(B)(i) 8

26 U.S.C. § 401(k)(2)(B)(i)(III) 8

26 U.S.C. § 402(g) 8

26 U.S.C. § 402(g)(1)(C) 8

26 U.S.C. § 411(a) 6

26 U.S.C. § 411(a)(2)(C)(i), *repealed by* Pub. L. No. 99-514 § 1113 9

26 U.S.C. § 411(a)(3)(B) 7

26 U.S.C. § 411(b)(2)(B) 16

26 U.S.C. § 414(v) 8, 12

26 U.S.C. § 414(v)(2)(B) 8

26 U.S.C. § 415(b) 9

26 U.S.C. § 415(b)(2)(C) 9

26 U.S.C. § 415(b)(2)(D) 9

26 U.S.C. § 419A(c)(2) 18

26 U.S.C. § 420 18

26 U.S.C. § 4975(e)(7)(A) 5

29 U.S.C. § 623(l)(1)(A) 12, 16

29 U.S.C. § 623(l)(2)(D)(ii) 13

29 U.S.C. § 631 5

29 U.S.C. § 1002(24) 6

29 U.S.C. § 1053(a) 6

29 U.S.C. § 1053(a)(2)(C)(i), *repealed by* Pub. L. No. 99-514 § 1113 9

29 U.S.C. § 1053(a)(3)(B) 7

29 U.S.C. § 1054(b)(2)(C) 16

29 U.S.C. § 1056(a) 6

Pub. L. No. 104-188 § 1404(a) 7

26 C.F.R. § 1.401(a)(4)-4(b)(3) (2003) 16

26 C.F.R. § 1.401(a)(4)-8(b)(1)(iv) (2003) 17

26 C.F.R. § 1.401(a)(4)-8(b)(1)(v) (2003) 16

26 C.F.R. § 1.401(a)(4)-8(b)(1)(viii) (Example (3)) (2003) 17

26 C.F.R. § 1.411(b)-1(b)(3)(iii) (Example (1)) (2003) 17

29 C.F.R. § 2530.203-3 (2003) 7

66 Fed. Reg. 53,555 (Oct. 23, 2001) 8

Rev. Rul. 81-140, 1981-1 C.B. 180 7

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038 16

H.R. Rep. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670 ..... 6, 10, 11

H.R. Rep. No. 99-313 (1986) 10

H.R. Rep. No. 99-426 (1985) 11

H.R. Rep. No. 101-664 (1990) 13

MISCELLANEOUS

Paul Fronstein & Dallas Salisbury, *Retiree Health Benefits: Savings Needed to Fund Health Care in Retirement*, Employee Benefit Research Institute, Issue Brief No. 254 (Feb. 2003), *available at* http://www.ebri.org/pdfs/0203ib.pdf 18, 19, 20

The Current State of Retiree Health Benefits: Findings From the Kaiser/Hewitt 2002 Retiree Health Survey (Dec. 2002), *available at* http://www.kff.org/content/2002/20021205a/6061v4.pdf 19

Percent of private sector establishments that offer health insurance by plan options and insurance offerings to retirees by State: United States, 2000, Medical Expenditure Panel Survey, Agency for Healthcare Research & Quality, United States Department of Health & Human Services, *available at* http://www.meps.ahrq.gov/MEPSDATA/ic/2000/Tables_II/TIIA2e.pdf.....20

Private Health Insurance: Declining Employer Coverage May Affect Access for 55-to 64-Year-Olds, General Accounting Office, HEHS-98-133 (June 1998), *available at* http://www.gao.gov.....19

No. 02-1080

In The
Supreme Court of the United States
October Term, 2003

GENERAL DYNAMICS LAND SYSTEMS, INC.,

Petitioner,

v.

DENNIS CLINE, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The ERISA Industry Committee ("ERIC") respectfully submits this *amicus curiae* brief in support of the Petitioner General Dynamics Land Systems, Inc. Correspondence reflecting the consent of the parties to the filing of *amicus curiae* briefs has been filed with the Clerk of the Court.[1]

---

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity other than *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

ERIC is a non-profit organization representing America's largest private employers. ERIC's members provide benefits to millions of active and retired workers and their families through pension, health care, and other employee benefit plans governed by the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code (the "tax code"). All of ERIC's members do business in more than one State, and many have employees in all fifty States. ERIC frequently participates as *amicus* in cases that have the potential to have a substantial impact on employee benefit design or administration.[2]

ERIC's members have a vital interest in this case. Pursuant to federal employee benefit and tax statutes, ERIC's members sponsor, and would like to be able to continue to sponsor, employee pension and welfare plans that provide enhanced benefits to their older workers. Many of these plans condition eligibility on a minimum age older than 40 or otherwise favor older workers who have achieved a certain age beyond 40. For the most part, the use of these over-age-40 milestones is either expressly or implicitly endorsed by ERISA and the tax code. An interpretation of the Age Discrimination in Employment Act ("ADEA") that would prohibit distinctions based on age among all workers over age 40 would negate or effectively re-write

[2] *See, e.g., Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

commonplace benefit plan features that are either required or permitted by ERISA and the tax code.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals erred in concluding that the ADEA permits younger workers in the ADEA's protected class to sue for discrimination on the grounds that older workers in the class received more or better benefits. The decision below is fundamentally at odds with the employee benefit architecture that Congress has constructed to require and encourage employers to provide additional benefits to their older employees. In ERISA and the provisions of the tax code granting favorable tax treatment to certain benefit plans, Congress itself has set certain age milestones that recognize that it is neither necessary nor appropriate to treat all workers age 40 and over as if their benefit needs were the same. Under these provisions, for example, once they reach ages 50, 55, 59½, 65, and 70½, plan participants either must receive or are permitted to receive certain benefits that are not available to younger participants.

It is inconceivable that Congress intended the ADEA to prohibit the type of practices that Congress itself has repeatedly and expressly endorsed. Nor is there any indication in the text or history of the ADEA that Congress intended to reserve to itself the prerogative to make age-based distinctions that provide more favorable benefits to older workers. Rather, the text and structure of the ADEA reflect the presumption that employers can and should provide benefits to older workers that are not available to their younger counterparts.

Many employers have benefit plans that provide retirees and older employees with benefits that are not made available on the same terms to all those age 40 and over. Principal among these are retiree health and life insurance plans, which are commonly open only to workers who have achieved some age milestone beyond age 40. Affirmance of the decision below would threaten these common benefit programs and frustrate the basic goals of the ADEA. For these reasons, ERIC respectfully submits this brief urging the Court to reverse the decision below.

ARGUMENT

I. FEDERAL LAWS GOVERNING EMPLOYEE BENEFITS MAKE THE KIND OF AGE-BASED DISTINCTIONS THAT WOULD BE UNALLOWABLE IF THE ADEA PROHIBITED "REVERSE" DISCRIMINATION.

The conclusion that, in enacting the ADEA, Congress intended to prohibit employers from making any age-based distinction over age 40 in the administration of their benefit plans is fundamentally at odds with the congressional judgments reflected in the statutes governing employee benefit plan design. Under the Sixth Circuit's novel interpretation of the ADEA, employers could be subject to liability for any employee benefit program that provides enhanced benefits to older workers unless the same benefits are available to all those age 40 and over. At the same time, ERISA and the tax code contain numerous provisions that either require or permit an employer to take into account the special situation of older employees. The decision below

therefore erroneously reads the ADEA in a manner entirely incompatible with the statutory regime of employee benefit regulation that Congress has constructed.

Under ERISA and the tax code, a typical worker is entitled to certain pension and welfare benefits once he reaches a certain age. These benefits begin not at age 40 when the employee enters the ADEA protected class, *see* 29 U.S.C. § 631, but when he reaches older, statutorily prescribed age thresholds such as 55, 59½, 65, and 70½.

At age 55, an employee must be allowed to diversify his account under the employer's Employee Stock Ownership Plan ("ESOP"). An ESOP is a defined contribution pension plan that invests contributions primarily in the stock of the employer. *See* 26 U.S.C. § 4975(e)(7)(A); *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995). However, the tax code requires that an ESOP participant be allowed to diversify up to 25% of his ESOP account after attaining age 55 and completing ten years of participation in the plan. *See* 26 U.S.C. § 401(a)(28). Under this provision, therefore, employers must grant workers age 55 and up — but not their counterparts age 40 to 54 years old — the right to expanded investment opportunities.

At age 59½, a worker may receive distributions from his retirement savings without financial penalty. To encourage workers to save funds for retirement, the tax code generally imposes an additional 10% tax on early distributions from qualified retirement plans. *See* 26 U.S.C. § 72(t). Once the worker reaches age 59½, however, this 10% tax is waived. *See* 26 U.S.C. § 72(t)(2)(A)(i). A waiver also applies to employees who terminate employment at age 55 or older. *See* 26 U.S.C. § 72(t)(2)(A)(v). In other words,

the tax code removes impediments to the receipt of distributions when the employee reaches age 59½, if the employee is still working, or age 55, if he has terminated employment.

At age 65, an employee who has terminated employment must be allowed to begin receiving his vested benefits under his employer's retirement plan. As a general rule, employee pension plans are not required to allow participants to begin receiving benefits immediately after terminating employment. Traditional defined benefit plans require the employee to attain an age defined as the "normal retirement age" under the plan before receiving retirement benefits. Nevertheless, ERISA and the tax code provide an exception to this general rule for workers age 65. Irrespective of the age that the plan designates as the "normal retirement age," ERISA and the tax code require an employer to allow a participant to begin receiving benefits at age 65 if he has terminated employment and began participation in the plan at least ten years earlier. *See* 29 U.S.C. § 1056(a); 26 U.S.C. § 401(a)(14). In conjunction with rules requiring full vesting of benefits under a pension plan at age 65,[3] the effect of this provision is to guarantee that the vast majority of employees can retire at age 65 with an immediate pension income. *See* H.R. Rep. 93-807, at 70 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4735 (rule intended to "ensure that a participant can reasonably expect to receive his retirement benefits during his retirement

[3] *See* 29 U.S.C. § 1053(a) (benefits must be fully vested upon attainment of "normal retirement age"); 29 U.S.C. § 1002(24) (normal retirement age may not be later than the later of age 65 or the completion of five years of participation in the plan); 26 U.S.C. § 411(a) (same).

years"). Only workers age 65 and up — and not their counterparts aged 40 to 64 — are entitled to this benefit.

At age 70½, a pension plan participant who continues to work for the employer must begin receiving an upward adjustment to his pension benefits. Under the law in effect before 1996, a participant in a pension plan had to begin receiving his benefits the year after he reached age 70½, even if he continued to work for the same employer. *See* 26 U.S.C. § 401(a)(9), *amended by* Pub. L. No. 104-188 § 1404(a), 110 Stat. 1755 (1996). In 1996, Congress amended Section 401(a)(9) of the tax code to provide that the commencement of distributions could be delayed beyond age 70½ as long as the participant continued to work for the same employer. *See* Pub. L. No. 104-188 § 1404(a). Congress nevertheless mandated that defined benefit plans provide an upward actuarial adjustment to the participant's benefit to take into account the period after age 70½ in which the employee does not receive retirement benefits. *See* 26 U.S.C. § 401(a)(9)(C)(iii). Under this provision of the tax code, only employees who reach 70½ are entitled to an upward adjustment.[4]

In addition to requiring employers to provide certain rights to employees who reach milestone ages over 40, the

[4] Similarly, if payment of a participant's pension benefit is suspended after the participant has reached normal retirement age (typically, age 65), the participant's benefit must be actuarially adjusted to reflect the delay in payment unless the plan suspends benefit payments in accordance with the applicable provisions of ERISA and the tax code. The requirement to provide an actuarial adjustment does not apply to a participant who has not yet attained normal retirement age. *See* 29 U.S.C. § 1053(a)(3)(B); 26 U.S.C. § 411(a)(3)(B); 29 C.F.R. § 2530.203-3 (2003); Rev. Rul. 81-140, 1981-1 C.B. 180.

tax code also allows employers to favor older workers with benefits not available to younger workers. For example, Section 401(k) — which allows employees to make tax-free contributions from their salary into a defined contribution plan — permits enhanced benefits for workers over age 59½. In order to qualify for favorable tax treatment, Section 401(k) generally provides that a plan must restrict most distributions until certain events (such as termination of employment, hardship, death, or disability) occur. *See* 26 U.S.C. § 401(k)(2)(B)(i). For employees over age 59½, however, the tax code allows a 401(k) plan to make special in-service distributions. *See* 26 U.S.C. § 401(k)(2)(B)(i)(III).

"Catch-up contributions" are another example of a discretionary, age-based benefit. The tax code currently provides that a participant in a Section 401(k) plan may not contribute more than a specified dollar amount to the plan. *See* 26 U.S.C. §§ 401(a)(30), 402(g). In 2003, for example, the law caps these elective deferral contributions at $12,000. *See* 26 U.S.C. § 402(g). This limitation prevents employees from deferring income tax on more than the specified sum. In 2001, however, Congress amended the tax code to allow participants who are at least age 50 to make "catch-up contributions" in excess of the otherwise applicable limits. *See* 26 U.S.C. §§ 414(v), 402(g)(1)(C). In 2003, employees age 50 and over may contribute an additional $2,000, and in subsequent years, even more. *See* 26 U.S.C. § 414(v)(2)(B) (limit increases by $1,000 each year after 2003 until 2006). Although a plan is not required to offer participants the opportunity to make such catch-up contributions, if it does, only participants age 50 or older may make them. *See* 66 Fed. Reg. 53,555, 53,556 (Oct. 23, 2001).

The tax code also allows defined benefit pension plans to pay employees higher pensions based solely on the worker's older age. Currently, the tax code sets limits on the annual benefit that can be paid to a participant from a qualified defined benefit pension plan: when converted to a life annuity, this annual benefit cannot exceed $160,000. 26 U.S.C. § 415(b). The tax code provides, however, that this $160,000 maximum is adjusted downward if the participant commences benefits prior to age 62, or adjusted upward if the participant commences benefits after 65. 26 U.S.C. §§ 415(b)(2)(C), 415(b)(2)(D). The limit is established at the equivalent of an annual benefit commencing at age 62 or 65, respectively. In other words, an employee who retires at age 55 and begins receiving a pension is subject to an annual benefit limit that is considerably lower than $160,000. Conversely, an older employee retiring at age 70 is eligible to receive substantially more than the $160,000 cap. The rationale behind this rule is that a worker who retires and begins receiving his pension at, for example, age 70 instead of age 65, will have fewer years in which to receive the annuity, and therefore, the maximum benefit that he is allowed to be paid each year should be increased.

Previous vesting rules instituted by ERISA also allowed employers to provide special benefits to older workers. Prior to 1986, ERISA and the tax code allowed a pension plan to provide for vesting under the "Rule of 45." Under this rule, a participant would become 50% vested in his benefit when his years of service equaled or exceeded five, and the sum of his age and years of service equaled 45. *See* 26 U.S.C. § 411(a)(2)(C)(i), *repealed by* Pub. L. No. 99-514 § 1113; 29 U.S.C. § 1053(a)(2)(C)(i), *repealed by* Pub. L. No. 99-514 § 1113. The participant would vest an additional 10% for each year of service thereafter. This age-

weighted vesting schedule was specifically intended to provide protection for the older worker who was closer to retirement and who may not have another chance to earn a pension if he left his employer before retirement. *See* H.R. Rep. No. 93-807, at 55 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4721 ("[T]he rule of 45 should be available as an alternative for those plans which would prefer to take an *age-weighted approach*.") (emphasis added). Although Congress ultimately repealed the Rule of 45 for reasons unrelated to age discrimination concerns,[5] the existence of the Rule of 45 for over a decade reflects Congress's understanding that employers may accommodate the needs of older workers through their benefit plans without extending the same treatment to all those age 40 and over.

The spectrum of age milestones that Congress has provided in ERISA and the tax code is neither random nor arbitrary. Under these statutes, Congress has not labeled every employee age 40 and over as an "older worker" who is entitled to the full range of pension and welfare benefits. Rather, these statutes recognize that workers have different needs as they age. For example, in Congress's estimation, only employees who retire at or after age 65 need to begin receiving retirement income immediately. *See* 26 U.S.C. § 401(a)(14). In contrast, employees nearing retirement age — age 55 and over in Congress's view — need greater options for retirement investing because of the fluctuations in the value of employer stock during the years prior to the

[5] *See* H.R. Rep. No. 99-313, at 589-90 (1986) (Rule of 45 eliminated as part of revision to all permissible vesting schedules in order to ensure participants vest more quickly than after completing 10-15 years of service).

employee's expected retirement date. *See* 26 U.S.C. § 401(a)(28). *Compare* H.R. Rep. No. 93-807, at 70 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4735 (provision requiring pension benefits to begin at age 65 intended "[t]o ensure that a participant can reasonably expect to receive his benefits *during* his retirement years") *with* H.R. Rep. No. 99-426, at 788 (1985) (ESOP diversification requirement intended to protect "plan participants *approaching* retirement age") (emphases added).

II. CONGRESS DID NOT INTEND THE ADEA TO PROHIBIT THE TYPE OF PRACTICE THAT IT HAS EXPRESSLY ENDORSED IN ERISA AND THE TAX CODE.

A. The ADEA Should Be Read In Harmony With The Approach Taken in ERISA And The Tax Code, Not Placed In Conflict With It.

The notion that the ADEA prohibits what ERISA and the tax code either require or permit is contrary both to common sense and to the courts' responsibility to interpret statutes harmoniously. *See J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A holding that the ADEA bars an employer from favoring older workers in benefit programs would either negate or effectively rewrite those provisions of ERISA and the tax code that use age-based distinctions. For example, under the theory of the decision below, employers presumably would have to provide diversification rights to ESOP participants age 40 and up, even though the tax code plainly permits this

opportunity to be provided only to workers age 55 and older. *See* 26 U.S.C. § 401(a)(28).

Similarly, no employer could take advantage of the opportunities that ERISA and the tax code provide to assist older employees because these statutes do not permit employers to extend the benefit to all workers at age 40. For example, the opportunity that the tax code provides for plans to offer "catch-up contributions" would be hollow because catch-up contributions may be offered only to employees age 50 or older. *See* 26 U.S.C. § 414(v). A reading of the ADEA that prohibits more favorable treatment for workers when they reach age 50, 55, 59½, 65, or 70½ conflicts with the policy judgment that Congress made in ERISA and the tax code to provide enhanced benefits to workers along an age continuum.

Nothing in the text or history of the ADEA compels the conclusion that Congress intended to put the age-discrimination statute in tension with those provisions of ERISA and the tax code that permit or require distinctions based on ages over 40. In the case below, the concurring opinion posited that Congress must have intended to require equal treatment in benefit programs for all workers in the protected class because Section 4(l) of the ADEA explicitly permits employers to condition eligibility for retirement benefits on the attainment of a minimum age. *See Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 473 (6th Cir. 2002) (Cole, J., concurring); 29 U.S.C. § 623(l)(1)(A). According to the concurrence, "[i]f younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in § 623(l)(1)(A) would not be necessary (because only younger employees could sue based on a minimum

retirement age)." *See Cline*, 296 F.3d at 473 (Cole, J., concurring) (parenthetical in original).

The legislative history of this provision plainly contradicts the concurring opinion's conclusion. Congress included this section not to obliquely recognize reverse discrimination claims, but merely to provide an example of conduct permitted by the ADEA: "[This] exception is included merely for clarification. No court or agency has ever concluded that the existence of a minimum age for retirement would constitute a violation of the Act." H.R. Rep. No. 101-664, at 59 (1990). The legislative history thus makes clear that Section 4(l) was not, as the concurrence surmised, creating an exception to the rule, but was simply *restating* the rule that it does not constitute a violation of the ADEA to provide certain benefits only to older workers in the protected class.

Other sections of the ADEA also reflect the congressional understanding that an employer need not offer benefits on comparable terms to all those age 40 and over. For example, retiree health benefits are defined, in part, as "benefits provided pursuant to a group health plan covering retirees, for which . . . the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII [*i.e.*, Medicare] . . . ." 29 U.S.C. § 623(l)(2)(D)(ii). If Congress intended the ADEA to prohibit age thresholds once a worker reached age 40, it would not have used a definition of retiree health coverage that turns only on the benefits available to those 65 and older.

The Sixth Circuit's attempt to reconcile its holding with this Court's precedents illustrates the absurd practical consequences of a "reverse" discrimination interpretation of the ADEA. In addressing the tension between reverse discrimination claims and this Court's holding in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996), the concurrence observed that a plaintiff could make out a prima facie case of reverse discrimination by showing that he had been disadvantaged in favor of someone with a "substantial difference in age" rather than a "substantially younger" counterpart, as prescribed in *O'Connor*. *See Cline*, 296 F.3d at 475 (Cole, J., concurring). Applying the "substantial difference in age" test, however, reinforces that Congress could not have intended to allow reverse discrimination claims under the ADEA. Under a "substantial difference in age" test, the younger the worker, the more easily he could make out his prima facie case. As an example, a plan administrator might grant a 65-year-old employee a discretionary benefit, but deny that benefit to 60-year-old and 40-year-old fellow employees. Under the "substantial difference in age" reformulation suggested by the concurring opinion below, the 40-year-old employee could more easily satisfy the prima facie case than could the 60 year old. That a younger employee more easily secures protection under an *age* discrimination law defies common sense and turns the ADEA on its head.

In sum, nothing in the ADEA indicates that it should not be read in harmony with ERISA and the tax code to permit age-based distinctions that make certain benefits available to workers as they age. To the contrary, the difficulties that would arise in reconciling the statutes weigh decisively against the Sixth Circuit's interpretation of the ADEA. Would the ADEA preempt those provisions of

ERISA or the tax code that require differential age treatment, or vice versa? Would the "minimum ages" of ERISA and the tax code be effectively rewritten to correspond with the ADEA protected class, so that the minimum age was always 40? Would an employer still be allowed to take advantage of an ERISA or tax provision permitting differential age treatment, or could the exercise of such an option still be discriminatory? The complexities in reconciling the different statutory regimes illustrate the folly of interpreting the ADEA to prohibit the type of age-based distinctions that Congress has expressly authorized and endorsed elsewhere.

B. A "Reverse" Discrimination Interpretation Of The ADEA Undermines The Statute's Purpose By Jeopardizing Employee Benefit Programs That Are Advantageous To Older Workers.

By calling into question any practice that advantages an older employee, the decision below threatens benefits enjoyed by countless workers, especially the older workers whom Congress sought to protect under the ADEA. Many employers have plans that make the age distinctions that have been required or permitted by Congress, as described in Part I, *supra*. But a number of plans provide advantageous benefits to older workers even without an express congressional instruction that they must or may do so once the employee reaches a certain age. Thus, even if the age differentiations found in ERISA and the tax code were found to be undisturbed by the ADEA, there would still be a number of benefit programs whose design would be called into question if the Court were to adopt an interpretation of the ADEA that precluded offering more generous benefits to

older workers except where expressly authorized by Congress.

Many commonly accepted pension plan designs favor older workers even though no specific age or age range has been set by Congress. For example, three types of pension plans favor older workers in the way that benefits accrue: target benefit pension plans, age-weighted defined contribution plans, and fractional accrual defined benefit plans. The tax code recognizes or encourages these age-based plan designs but leaves employers with the discretion to specify the age markers.[6]

A target benefit plan is a defined contribution plan that sets a "target" benefit for each employee. Both Congress and the United States Department of the Treasury have sanctioned or encouraged these benefit plans. *See* 26 U.S.C. § 411(b)(2)(B); 29 U.S.C. § 1054(b)(2)(C); 26 C.F.R. §§ 1.401(a)(4)-4(b)(3), 1.401(a)(4)-8(b)(1)(v) (2003) (Internal Revenue Service will not challenge plans as violating certain non-age-related discrimination rules in tax code). To reach the target upon the employee's retirement, the employer contributes a designated amount to the employee's account. *See* H.R. Conf. Rep. No. 93-1280, at 344 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5060. Because contributions for older employees have less time to grow and compound, the employer must make larger contributions each year for older workers than it does for

[6] While the ADEA expressly recognizes that it is not discriminatory for an employer to establish a minimum age of eligibility for normal or early retirement benefits, *see* 29 U.S.C. § 623(l)(1)(A), it is silent on other age-based features that may benefit older workers, such as the rate of benefit accrual.

their younger counterparts in order to hit the prescribed targets.

Age-weighted defined contribution plans also benefit older workers. Under these plans, employers contribute more to a worker's retirement as that worker's age, or combination of age and service, increases. For example, such a plan might provide for a contribution on behalf of all eligible employees of 2% of salary if the employee is under age 45, and 3% of salary if the employee is over age 45. These plans have long been accepted as legal, including by the Department of the Treasury, and their designs are subject to extensive regulation. *See* 26 C.F.R. §§ 1.401(a)(4)-8(b)(1)(iv), 1.401(a)(4)-8(b)(1)(viii) (Example (3)) (2003) (permitting plan design that "provides that allocation rates for all employees are determined using a single schedule based solely on age").

Last, fractional accrual defined benefit plans also operate to the advantage of older workers. As with age-weighted defined contribution plans, fractional accrual plans have been expressly approved by the Department of the Treasury. *See* 26 C.F.R. § 1.411(b)-1(b)(3)(iii) (Example (1)) (2003). In a fractional accrual plan, a worker who retires at normal retirement age receives a percentage, *e.g.*, 30%, of his final average compensation during each year of retirement. A participant who terminates employment prior to normal retirement age, however, receives only a "fraction" of the benefit he would have earned had he worked until normal retirement age; this fraction is based on the number of years the participant would have had to work to reach normal retirement age. Therefore, a worker who begins to participate in the plan at an older age (for example, age 60) accrues a larger benefit each year than a worker who begins

to participate in the plan at a younger age (for example, age 45) because the older worker enters the plan when he is closer to the plan's normal retirement age.

Retiree health insurance programs are probably the most widespread example of employee benefit plans that commonly differentiate in favor of older workers. A number of provisions of the tax code encourage employers to provide retiree health and life insurance coverage;[7] however, these provisions do not specify the age at which a separated employee becomes a "retiree" eligible for those benefits. Most large private employers make retiree health benefits available only to workers who reach some age milestone above 40. *See, e.g.*, Paul Fronstein & Dallas Salisbury, *Retiree Health Benefits: Savings Needed to Fund Health Care in Retirement*, Employee Benefit Research Institute, Issue Brief No. 254, 9 (Feb. 2003), *available at* http://www.ebri.org/pdfs/0203ib.pdf (hereinafter "EBRI Brief").

In 2002, 64% of employers with 1,000 or more employees provided retiree health coverage only to employees age 50 or older who met some length of service requirement. *Id.* In 2002, the most common age threshold for retiree health benefits was age 55: 58% of large

[7] *See, e.g.*, 26 U.S.C. § 401(h) (pension plans may provide payment of benefits for medical expenses of retired employees and their spouses and dependents); 26 U.S.C. § 420 (excess assets in pension plan trust may be transferred to account to pay current retiree health liabilities); 26 U.S.C. § 419A(c)(2) (plans may reserve additional funds under qualified asset account to pay post-retirement medical and life insurance benefits). *Cf.* 26 U.S.C. § 132(h)(1) (employer may provide retirees with tax-free fringe benefits such as no-additional-cost service and qualified employee discounts).

employers last year conditioned eligibility for retiree health benefits on the employee reaching age 55 and satisfying a years of service requirement. *Id.* Indeed, minimum age requirements are essentially universal in retiree health plans. According to a nationwide survey of 435 large companies, less than 1% of large employers offering pre-65 retiree health coverage and 3% of employers providing retiree health coverage for those 65 and older based eligibility on years of service alone in 2002. *The Current State of Retiree Health Benefits: Findings From the Kaiser/Hewitt 2002 Retiree Health Survey*, 2, 4 (Dec. 2002), *available at* http://www.kff.org/content/2002/20021205a/6061v4.pdf (hereinafter "Kaiser/Hewitt Retiree Health Survey").

By calling into question any age distinction that benefits older workers relative to their younger counterparts in the ADEA's protected class, the interpretation of the ADEA set forth in the decision below is a major threat to an employer's decision to provide retiree health coverage. In recent years, the costs of retiree health coverage have grown dramatically. Between 2001 and 2002 alone, the cost of retiree health benefits increased by an estimated 16% on average among large employers in a recent survey. *Kaiser/Hewitt Retiree Health Survey*, at 10. Many employers have responded to these cost increases by eliminating retiree health coverage altogether. Over the last decade, the level of retiree health benefit coverage has declined steadily. *Id.* at v. While an estimated 60-70% of large employers provided retiree health benefits during the 1980's, fewer than 40% offered such coverage by 1998. *Private Health Insurance: Declining Employer Coverage May Affect Access for 55-to 64-Year-Olds*, General Accounting Office, HEHS-98-133 at 7 (June 1998), *available at* http://www.gao.gov. According to the United

States Department of Health and Human Services, in 2000 only 12% of all private establishments offered health benefits to workers retiring before age 65, and only 10.7% offered coverage to Medicare-eligible retirees. *Percent of private sector establishments that offer health insurance by plan options and insurance offerings to retirees by State: United States, 2000*, Medical Expenditure Panel Survey, Agency for Healthcare Research & Quality, United States Department of Health & Human Services, *available at* http://www.meps.ahrq.gov/MEPSDATA/ic/2000/Tables_II/TIIA2e.pdf.

In light of rising costs, many employers might be forced to reduce or discontinue retiree health benefits altogether if faced with a mandate to expand these benefits to every worker age 40 and over. Furthermore, those employers who today would seek to preserve benefits for the oldest members of their workforce by increasing age eligibility requirements, *see EBRI Brief*, at 8, would no longer have this option available. These employers too would likely be forced to take the more drastic step of eliminating their retiree health benefit programs in their entirety.

Ultimately, the interpretation of the ADEA adopted by the decision below is likely to work to the detriment of older workers. Instead of having more secure pension and welfare benefits, older workers could lose many of the advantageous benefits that they now enjoy. That surely was not the intent of Congress in 1967 when it enacted the ADEA or in 1990 when it extended the ADEA to cover employee benefit programs. In ERISA and the tax code, Congress itself has repeatedly and explicitly required or permitted employers to provide more generous benefit

treatment to workers who have attained certain age milestones over age 40. The ADEA should be construed consistently with those statutes, and the Sixth Circuit's contrary interpretation should be reversed.

CONCLUSION

For all of these reasons, as well as those set forth in the brief for Petitioner, *amicus* respectfully urges the Court to reverse the decision below.

Respectfully submitted,

Caroline M. Brown
Counsel of Record
John M. Vine
Aimee Feinberg
Michael L. Hadley
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

July 7, 2003

Supreme Court, U.S.
FILED
JUL 7 2003
CLERK

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit**

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

ROBERT H. CHANIN *
JOHN M. WEST
DOUGLAS L. GREENFIELD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

* Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

20pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. COLLECTIVE BARGAINING AGREEMENTS ROUTINELY PROVIDE FOR BENEFITS, THE AVAILABILITY OR TERMS OF WHICH DEPEND ON THE EMPLOYEE'S ATTAINMENT OF A MINIMUM AGE	4
II. AGE IS DIFFERENT FROM OTHER ANTI-DISCRIMINATION CLASSIFICATIONS IN WAYS THAT ARE DIRECTLY RELEVANT TO EMPLOYEE BENEFITS	8
III. THE ADEA DOES NOT PROHIBIT EMPLOYEE BENEFIT PLANS IN WHICH THE AVAILABILITY OR TERMS OF A BENEFIT DEPEND ON THE EMPLOYEE'S ATTAINMENT OF A MINIMUM AGE	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193 (3d Cir. 2000) 5
Fort Stewart Schools v. FLRA, 495 U.S. 641 (1990) 14
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 7
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 9
Muller v. Oregon, 208 U.S. 412 (1908) 8
Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 13
Twisdale v. Snow, 325 F.3d 950 (7th Cir. 2003) 16

STATUTES

26 U.S.C. § 401(a)(28) 11
26 U.S.C. § 401(k)(2)(B)(i)(III) 11
26 U.S.C. § 411(a)(8) 14
26 U.S.C. § 411(b)(1)(G) 14
26 U.S.C. § 411(b)(1)(H) 14
26 U.S.C. § 415(b)(2)(C) 11
26 U.S.C. § 415(b)(2)(D) 11
26 U.S.C. § 72(t)(2)(A)(i) 11
26 U.S.C. § 72(t)(2)(A)(v) 11
29 U.S.C. § 621(a) 13
29 U.S.C. § 621(a)(1) 8
29 U.S.C. § 621(b) 4, 13
29 U.S.C. § 622(a) 13
29 U.S.C. § 623(f)(2)(A) 7, 13, 14
29 U.S.C. § 623(f)(2)(B)(i) 9, 10, 15
29 U.S.C. § 623(f)(3) 14
29 U.S.C. § 623(i)(1) 14
29 U.S.C. § 623(*l*)(1)(A) 5, 14
29 U.S.C. § 628 5

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 631(a) 12
29 U.S.C. § 1002(24) 14
29 U.S.C. § 1054(b)(1)(G) 14
29 U.S.C. § 1054(b)(1)(H) 14
29 U.S.C. § 1054(b)(2) 14
Pub. L. 101-433, 104 Stat. 978 13

MISCELLANEOUS

68 Fed. Reg. 31116 (May 27, 2003) 5
Michael J. Van Sistine & Bruce Meredith, *The Legality of Early Retirement Incentive Plans*, 84 Marq. L. Rev. 587 (2001) 10

IN THE

Supreme Court of the United States

No. 02-1080

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus National Education Association ("NEA") is a nationwide employee organization with some 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States.[1] As articulated in its mission statement, one of NEA's primary purposes is to "expand the rights and further

[1] This brief *amicus curiae* is submitted with the consent of the parties, whose letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

the interest of educational employees." Working through a network of affiliated organizations at the state and local levels, NEA attempts to do this by representing education employees in dealing with their employers in regard to salaries, benefits, and other terms and conditions of employment. In most jurisdictions, this representation takes place through collective bargaining.

Collective bargaining agreements that are negotiated by NEA affiliates routinely contain provisions that determine eligibility for, or the terms of, retirement, health insurance, severance pay, and other benefits on the basis of whether the employee has attained some minimum age. The decision of the court below calls into question the legality of many such provisions and, if allowed to stand, would seriously impair the ability of NEA affiliates and the employers with which they deal to take into account the particular needs of older employees in allocating scarce resources through the collective bargaining process.

NEA submits this brief *amicus curiae* to protect the integrity of its affiliates' collective bargaining agreements against an interpretation of the Age Discrimination in Employment Act that could not have been within the contemplation of Congress.

SUMMARY OF ARGUMENT

1. Provisions that condition eligibility for a benefit on the attainment of a minimum age, or vary the terms of the benefit with increasing age, are routine features of employee benefit programs negotiated as part of collective bargaining agreements between employers and unions. Many of these exceedingly common employee benefit programs would not survive under the analysis of the court below. Rather than stemming from age-based animus or stereotypes, such differential allocation of benefits, in the areas of pensions,

health care, severance pay, and the like, reflects the parties' attempt to target scarce resources to those employees who need them most.

2. Because the experience of old age is one that (barring misfortune) is experienced by all, and because of the objectively greater needs and costs that come with advancing age, age is different from other anti-discrimination classifications—in ways that are directly relevant to employee benefits provided in connection with or in anticipation of old age. For this reason, principles derived from the context of race or gender discrimination cannot be applied without further analysis in the context of age discrimination. Indeed, both law and society recognize the particular needs of older employees and the legitimacy of differential treatment based on advanced age.

3. In enacting the ADEA, Congress understood the unique nature of age, and did not prohibit the preferential allocation of employee benefits to older employees that is at issue here. The ADEA's repeated emphasis on the problems and needs of "older" workers—as well as a specific statutory provision that addresses the differential provision of benefits to older and younger workers—are inexplicable if Congress' intent was to prohibit employers from treating older employees more generously than their younger peers with respect to the provision of benefits that allow employees to deal with the consequences of old age. Far from being faithful to the intent of Congress, the ultra-literal reading of the statute adopted by the court below merely confirms the limitations of literalism as a method of statutory interpretation.

ARGUMENT

It is the premise of this brief that age is fundamentally different from other characteristics on which our nation's anti-discrimination laws are based—such as race, gender, or religion—and that because of this difference it is entirely

reasonable for unions and employers, in collective bargaining, to adopt employee benefit packages that in certain respects may treat older workers more generously than their younger peers. The Age Discrimination in Employment Act ("ADEA")—which was enacted "to promote employment of older persons," 29 U.S.C. § 621(b)—recognizes the unique nature of age as an anti-discrimination classification, and does not, we submit, prohibit employers and unions from negotiating benefits that depend on the employee's attainment of a minimum age or otherwise treat older employees more favorably.

I. COLLECTIVE BARGAINING AGREEMENTS ROUTINELY PROVIDE FOR BENEFITS, THE AVAILABILITY OR TERMS OF WHICH DEPEND ON THE EMPLOYEE'S ATTAINMENT OF A MINIMUM AGE

The facts of this case are not unusual. Whether in the context of provisions intended to ameliorate the impact on employees of a plant shutdown, or in the allocation of retiree health benefits that the employer is willing to provide only for a limited number of years, or in the explicit recognition of the greater needs of older workers, it is not at all remarkable for unions and employers to adopt, through collective bargaining, employee benefit programs that either condition the availability of a benefit on the attainment of a minimum age or vary the terms and amounts of the benefit on that basis. Most such benefit programs would, on the Sixth Circuit's view, be unlawful.

The most ubiquitous such benefit is, of course, a pension plan, which (except in rare cases) establishes a minimum age of eligibility for retirement and provides benefits that increase with the employee's retirement age. While the establishment of a minimum age of eligibility for normal or early retirement in such plans is recognized and expressly permitted by the

ADEA, 29 U.S.C. § 623(*l*)(1)(A),[2] that provision does not specifically address the nearly universal practice of paying benefits that increase with the employee's age at retirement.

Almost equally common—and similarly unprotected by § 623(*l*)(1)(A)—are benefit programs that provide employee benefits other than pensions, most notably health-care benefits. For the same actuarial and practical reasons that guide the design of pension plans, such welfare benefit plans are frequently designed to use a minimum age as an eligibility criterion. For example, it is not unusual for a collective bargaining agreement to provide for retiree health benefits, but only for retirees beyond a certain age.[3]

A union and an employer might negotiate a minimum age requirement for retiree health coverage for either of at least two reasons. First, the employer might be willing to commit only limited resources to such a benefit, and the minimum age of eligibility permits the parties to target whatever benefits the employer is willing to fund to those retirees who

---

[2] Section 623(*l*)(1)(A) provides that it is not a violation of the ADEA for "an employee pension benefit plan . . . [to] provide[ ] for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits."

[3] Such retiree health coverage also frequently converts to less valuable and less costly coverage or terminates altogether at the age of eligibility for Medicare benefits. This use of a cut-off age permits the employer to allocate whatever funds it can provide for retiree health care to those retirees who have no other source of health insurance, without committing to lifetime coverage. While one recent court decision has held such a cut-off age unlawful under the ADEA to the extent the employer-provided benefits exceed those available under Medicare, *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), the Equal Employment Opportunity Commission is currently preparing, pursuant to its authority under 29 U.S.C. § 628, a regulation that would exempt from ADEA's prohibitions "the practice of altering, reducing, or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or comparable State retiree health benefits." 68 Fed. Reg. 31116 (May 27, 2003).

need them most. It is not unreasonable to assume that older retirees will have a greater need for such benefits, both because it will be more difficult or expensive for them to obtain coverage from another source, and because their health-care needs will—at least on an actuarial basis—be greater. Second, employers may wish to limit the availability of the retiree health benefit to retirees beyond a certain age as a means of encouraging their employees to remain at work even after having reached the minimum age necessary for retirement.

Another common situation in which a union and an employer will negotiate a benefit that is restricted to employees who have attained some minimum age arises when the employer orders mass layoffs because of "downsizing," a plant closing, or—in the public sector—privatization of bargaining unit work. In such situations, the employer is required to bargain with the union at least over the effects of its decision, and it is not uncommon for such "effects bargaining" to result in an agreement that provides severance pay or some other benefit to employees who lose their jobs. If the employer is unable or unwilling to provide a satisfactory level of benefits for all laid-off or terminated employees, the union and employer may, quite reasonably, agree to target the benefits to those who are likely to experience the greatest difficulty in finding new employment—the older employees.

A similar, albeit less extreme, situation arises when an employer's altered economic or competitive circumstances (whether real or feigned) cause it to insist on eliminating or reducing benefits provided under a collective bargaining agreement—often as an alternative to a threatened plant closing or layoffs. That appears to be what occurred in this case, where a new collective bargaining agreement's elimination of previously provided retiree health benefits was mitigated by a type of "grandfather" provision, under which

employees over 50 years of age as of the date of the new agreement would still be eligible for such benefits. *See* Pet. App. at 3a. The opinion of the court below does not explain the parties' reasoning in adopting that provision, but the rationale seems both evident and eminently reasonable: excluding the oldest employees from the impact of the elimination of the retiree health benefits shielded those who had built up the greatest expectations of entitlement to such benefits upon retirement and who, being closest to retirement, had the least opportunity to make alternative arrangements for health care after their retirement.

Other concessionary negotiations, rather than resulting in retention of the benefit only for a group of "grandfathered" employees, as in this case, might yield agreements that leave the benefit in place prospectively while imposing a new (or higher) minimum age of eligibility.[4]

In none of these cases do the preferences given to older employees reflect decisions made "on the basis of inaccurate and stigmatizing stereotypes," which prompted Congress to enact the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604,

---

[4] None of these scenarios that result in greater benefits for older employees should be surprising. It is, in point of fact, the rule and not the exception that collective bargaining agreements do not apportion whatever the union is able to obtain from the employer—in terms of pay, choice of assignments, protection from layoff, and so on—on the basis of strict equality among all members of the bargaining unit. Rather, such benefits are divided unequally on the basis of what is one of the fundamental principles of collective bargaining—and indeed is adhered to by many employers even in a nonunion setting—namely, the rule of seniority. Notwithstanding that the use of seniority can have much the same effect as advantaging older workers on the basis of their age, this Court has upheld the allocation of benefits based on seniority, *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), and the ADEA specifically exempts "bona fide seniority system[s]" from its prohibitions. 29 U.S.C. § 623(f)(2)(A).

610 (1993).[5] They are based rather on actuarial realities and on specific, objectively recognizable problems confronted by older employees, including precisely the problem recognized by the ADEA—which the statute has not wholly eradicated—of the greater difficulties faced by older persons in finding new employment once displaced from the workforce. *See* 29 U.S.C. § 621(a)(1).

And it hardly need be pointed out that notwithstanding the use by the courts below of the term "reverse discrimination," there is no issue in this case or in any of the scenarios outlined above of any kind of "affirmative action." That is, to the extent certain fringe benefits are made available on a preferential basis to older employees, such preferences have nothing to do with any attempt to correct a perceived under-representation of older employees in the workforce.

Rather, the reasons for such preferences have to do with the realities of age, a subject to which we now turn.

II. AGE IS DIFFERENT FROM OTHER ANTI-DISCRIMINATION CLASSIFICATIONS IN WAYS THAT ARE DIRECTLY RELEVANT TO EMPLOYEE BENEFITS

A. While it is difficult to imagine that Congress ever would sanction a differentiation in employee benefits based on race, gender, or religion, that is not so for age. Age differs from other prohibited grounds of discrimination in ways that explain why Congress did not intend for the prohibition against discrimination on the basis of age to exclude more generous treatment of older employees in the allocation of employee benefits—such as retirement and early retirement benefits, retiree health care, severance benefits, and the like –

[5] And that includes "benevolent" stereotypes, such as the gender stereotypes that in an earlier era resulted in differential application of workplace protection standards to men and women. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908).

that relate to the employee's preparation for and dealing with the consequences of advancing age.

The first—and most obvious—difference is that age is not, like race or gender, immutable (or nearly so); nor is it even, like religion, a classification that is rarely changed even though it is possible to do so. One's age is not only subject to change, but this change is inexorable. As the Court has put it, "all persons, if they live out their normal life spans, will experience [old age]." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

A second difference is the objective fact that old age brings with it greater needs and greater costs.[6] With regard to health care, older persons typically have greater needs than younger persons. As a result, if they are not covered by an employer's health-care program, they must often pay more than would a younger person for the same health insurance. With old age, moreover, employment usually comes to an end, resulting in the need for an alternative source of income. And, if an older person's unemployment is involuntary rather than pursuant to a planned retirement, still-existing age discrimination is likely to make finding another job more difficult.

It bears pointing out that, with advancing age, the closer the employee is to the time when he or she will need the age-related employee benefits at issue here—and the less flexibility he or she will have in making other arrangements in the case of unforeseen employment changes.

All of these factors are unique, or nearly so, to age as an anti-discrimination classification. They point up why one cannot simply assume that, in enacting the ADEA, Congress

[6] The ADEA, in 29 U.S.C. § 623(f)(2)(B)(i), specifically recognizes that the cost of providing a given benefit will often be greater for older than younger persons. It allows an employer to provide a lesser benefit to older than to younger employees if the employer incurs at least the same cost in providing the benefit to the older employees.

intended to apply principles gleaned from the context of race or gender discrimination to the question of whether the differential provision of employee benefits targeted at addressing the consequences of old age constitutes "discrimination" on the basis of age.

Thus, while a cost-based justification for race or gender discrimination is inconceivable, the ADEA specifically permits the differential provision of benefits to older and younger workers based on cost. *See* 29 U.S.C. § 623(f)(2)(B)(i).

Or, to take another example, while some cases hold to the contrary, the principles discussed above suggest that a voluntary early retirement incentive plan—which typically provides age-based cash incentives in order to encourage employees to retire before attaining their normal retirement age—should not be evaluated in the same way as a hypothetical plan that provided race- or gender-based incentives in order to encourage members of a particular race or gender to retire from the workforce. *See* Michael J. Van Sistine & Bruce Meredith, *The Legality of Early Retirement Incentive Plans*, 84 Marq. L. Rev. 587 (2001).

In sum, principles gleaned from the context of race or gender discrimination cannot be applied without further analysis to the question of whether employee benefits targeted at addressing the consequences of old age—perhaps on a differential basis—constitute "discrimination" on the basis of age.

B. Not only is age unique as an anti-discrimination classification, but the law expressly recognizes the particular needs of older employees and the legitimacy, in certain contexts, of differential treatment based on age. Many legal rules allow, or even require, preferential treatment with respect to certain kinds of employee benefits for employees who have attained some minimum age. Thus, for example, the Internal Revenue Code penalizes distributions from a qualified retirement plan

if they are made to an employee who is younger than age 59½, or to a former employee who separates from service before attaining age 55. 26 U.S.C. § 72(t)(2)(A)(i), (v). A qualified defined contribution pension plan containing a qualified cash or deferred arrangement may not permit distributions to an employee who has not attained age 59½. 26 U.S.C. § 401(k)(2)(B)(i)(III). A qualified employee stock ownership plan must allow participants who have completed 10 years of service to invest a specified portion of their plan accounts in diversified investments other than employer securities if—but only if—the participant is age 55 or older. 26 U.S.C. § 401(a)(28). Qualified defined benefit retirement plans may distribute greater maximum annual benefits to older participants than to younger participants. 26 U.S.C. § 415(b)(2)(C), (D).

In each of these examples, the tax laws mandate employee benefit plan designs that favor older workers over younger workers, even though the younger workers may have attained the age of 40. They do so because of certain inescapable facts about older employees: they are closer to the point in life at which they will need to draw on these benefits; they typically will have greater health-care and other needs; and they are less likely to be in a position to adapt to changed circumstances with respect to their employment, benefits, or investments.

Indeed, the factual differences between younger and older persons are so evident that society has never considered it to be illegitimate "age discrimination" to provide a variety of preferences for persons beyond a certain age—ranging from "senior" rates for movie tickets to eligibility for membership in the AARP.[7]

---

[7] Membership in the AARP—doubtless the nation's foremost defender of the ADEA and of the principles on which it is based—is open only to persons who have attained the minimum age of 50. *See* <http://www.aarp.org/leadership/Articles/a2003-01-13-aarphistory.html>.

Age is, in sum, different from other characteristics on which our nation's anti-discrimination laws are based, and it is different precisely in ways that relate to employee benefits that are provided in connection with or in anticipation of old age. As we next show, the ADEA recognizes this difference, and cannot be read to prohibit collectively bargained employee benefits that are conditioned on the attainment of a minimum age or that otherwise provide more generous treatment for older workers.

III. THE ADEA DOES NOT PROHIBIT EMPLOYEE BENEFIT PLANS IN WHICH THE AVAILABILITY OR TERMS OF A BENEFIT DEPEND ON THE EMPLOYEE'S ATTAINMENT OF A MINIMUM AGE

The ADEA is a complex statute, and it is not our intent to duplicate the detailed statutory construction that will be presented by petitioner and other *amici*. Nonetheless, we address briefly several points in order to demonstrate that Congress could not have intended to prohibit, as invidious discrimination, the kind of collectively bargained employee benefit provision that is at issue in this case – one in which employer and union target scarce resources in an attempt to meet the needs of older workers, for whose benefit the ADEA was enacted.

A. There is good reason to believe that Congress, in enacting the ADEA's prohibition on discrimination on the basis of "age," used that term—as it is not infrequently used—to mean "old age." Had Congress meant to enact a sweeping prohibition against treating anyone differently because that person was of a *different* age—whether older or younger—than someone else, it is difficult to imagine why Congress would have limited the ADEA's protection to persons age 40 and older. *See* 29 U.S.C. § 631(a). The

establishment of a protected class of older persons strongly suggests that what Congress meant to prohibit was discrimination against older persons in favor of younger persons.

This conclusion gains support from the statute's numerous references to the protection of "older workers" or "older persons." Thus, the ADEA's statement of congressional findings, 29 U.S.C. § 621(a), notes that "older workers" are disadvantaged in seeking and retaining employment, that otherwise desirable employment practices may work to the disadvantage of "older persons," and that the incidence of unemployment is high among "older workers." Against this background, Congress declared that the purpose of the ADEA was "to promote employment of *older persons*." 29 U.S.C. § 621(b) (emphasis added). And in its next section, the ADEA directs the Secretary of Labor to undertake a program of education and research "concerning the needs and abilities of *older workers*." 29 U.S.C. § 622(a) (emphasis added).

When Congress amended the ADEA in 1990 to overrule this Court's decision in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), it called the amendatory statute the "*Older Workers* Benefit Protection Act." Pub. L. 101-433, 104 Stat. 978 (emphasis added). And § 101 of that Act reiterated that Congress' purpose in enacting the ADEA had been "to prohibit discrimination *against older workers* in all employee benefits . . . ." *Id.* (emphasis added).

Such statutory language is inexplicable unless what Congress meant to prohibit, in banning discrimination on the basis of "age," was discrimination against *older* employees in favor of *younger* employees.

B. There are two ADEA provisions that can be read as providing limited safe harbors for treating older employees more favorably than younger employees. Thus, § 623(f)(2)(A) protects the observance of "bona fide seniority system[s]"—which generally inure to the benefit of older

employees. And, as noted above, § 623(*l*)(1)(A) sanctions the use of a minimum age of eligibility for normal or early retirement benefits. While it could be argued that these provisions would be superfluous if the ADEA did not, at least in some circumstances, prohibit discrimination in favor of older employees, a more likely explanation is that these two provisions were "technically unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*)." *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990).

That the ADEA is such a "belt and suspenders" statute is apparent from other provisions as well. For example, § 623(f)(3) provides that it shall not be unlawful to discharge or discipline an employee "for good cause." But any incident of discharge or discipline that was motivated by "good cause" obviously would not have been motivated by the employee's age, thus making it nonactionable under the ADEA even in the absence of § 623(f)(3). The explanation is, no doubt, that this provision was inserted out of an abundance of caution, and the same is doubtless true of §§ 623(f)(2)(A) and 623(*l*)(1)(A).[8]

---

[8] There is also a more specific explanation for the presence in the statute of § 623(f)(2)(A). Both the Internal Revenue Code and the Employee Retirement Income Security Act contain express provisions permitting pension plans to designate a normal retirement age when benefits become payable and must vest. *See* 26 U.S.C. § 411(a)(8); 29 U.S.C. § 1002(24). Section 623(*l*)(1)(A) is probably best viewed as an attempt to ensure that the ADEA contained a parallel provision on this subject to those of the IRC and ERISA. The same concern of maintaining parallelism among the three statutes can be seen in other provisions as well. *See, e.g.*, 29 U.S.C. § 623(i)(1)(plans may not permit the cessation of benefit accruals, the reduction of the rate of benefit accrual, or the cessation or reduction of allocations to an employee's account based on age); 26 U.S.C. §§ 411(b)(1)(G), (H) and 411(b)(2) (same); 29 U.S.C. §§ 1054(b)(1)(G), (H) and 1054(b)(2) (same).

C. While the foregoing establishes that the ADEA was not intended to prohibit preferential treatment of older employees generally, it is particularly clear that Congress intended to allow for the provision of *employee benefits* on terms more favorable to older than younger employees. In § 623(f)(2)(B)(i) the ADEA expressly provides that it shall be lawful for employers and unions "to observe the terms of a bona fide employee benefit plan"—which the retiree health plan at issue in this case indisputably is—"where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . . ."

That proviso clearly permits the provision of *greater* benefits for older than younger workers. In the instant case, for example, the "payment made or cost incurred" on behalf of the younger workers who constitute the plaintiff class—employees younger than age 50 on July 1, 1997—is zero. Necessarily, therefore, the "payment made or cost incurred" on behalf of the older workers who remained eligible for the retiree health benefit at issue could be "no less than" the zero cost incurred on behalf of the younger employees. In this situation, as in the similar circumstances discussed in Part I above, § 623(f)(2)(B)(i) clearly expresses Congress' intent to make it lawful for employers to observe the terms of employee benefit plans that provide a more generous benefit to older employees.

D. It seems clear, therefore, that the Sixth Circuit's interpretation of the ADEA to support a claim of discrimination against younger employees—particularly with respect to the allocation of employee benefits that are designed to address the consequences of advancing age—cannot be sustained by any reasonable reading of the statutory language. Even if the import of the statutory language were less clear than we believe it to be, moreover, the Sixth Circuit's ultra-literal reading of that language still could not be sustained.

As Judge Posner has recently observed, "[p]erverse and absurd statutory interpretations are not to be adopted in the name of literalism; they merely show the limitations of literalism as a mode of interpretation." *Twisdale v. Snow*, 325 F.3d 950, 953 (7th Cir. 2003). The Sixth Circuit's perverse interpretation of the ADEA to render unlawful employee benefit plans that, like the one at issue in this case, are intended to address the very problems of older employees that prompted enactment of the statute is a prime example of such misplaced literalism. That reading of the statute is not faithful to the intent of Congress and must be rejected.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

ROBERT H. CHANIN *
JOHN M. WEST
DOUGLAS L. GREENFIELD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

* Counsel of Record

Counsel for Amicus Curiae

No. 02-1080

FILED
JULY 7, 2003

IN THE

Supreme Court of the United States

General Dynamics Land Systems, Inc.,
Petitioner,

v.

DENNIS CLINE, *et-al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

DANIEL W. SHERRICK
MICHAEL F. SAGGAU
8000 East Jefferson Avenue
Detroit, MI 48214

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 10

STATUTES AND REGULATIONS

Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*:
- §1(b), 29 U.S.C. § 621(b) 3, 14
- § 4(a)(1), 29 U.S.C. § 623(a)(1) 4
- § 4(f)(2)(B)(i), 29 U.S.C. § 623(f)(2)(B)(i) .. *passim*
- § 11(l), 29 U.S.C. § 630(l) 12

Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*:
- § 3(1), 29 U.S.C. § 1002(1) 6
- § 3(3), 29 U.S.C. § 1002(3) 6

Older Workers Benefit Protection Act of 1990. P.L. 101-433, 104 Stat. 978, 978-979 (1990) 10, 14
- § 101 10
- § 103 10

29 C.F.R. § 1625.2(b) 9
29 C.F.R. § 1625.10 ..... 7, 11
29 C.F.R. § 1625.10(a)(1) 8
29 C.F.R. § 1625.10(b) 6
29 C.F.R. § 1625.10(c) 8
29 C.F.R. § 1625.10(d) 8
29 C.F.R. § 1625.10(d)(2) 9
29 C.F.R. § 1625.10(f)(2)(iii) 9

MISCELLANEOUS

135 Cong. Rec. S9948-49 (1989) 11
136 Cong. Rec. S9444 (1990) 14
136 Cong. Rec. S13240 (1990) 12
136 Cong. Rec. S13241 (1990) 13
136 Cong. Rec. S13594 (1990) 14

TABLE OF AUTHORITIES—Continued

Page

136 Cong. Rec. S13598 (1990) 14
136 Cong. Rec. S13611 (1990) 14
136 Cong. Rec. H8738 (1990) 14
46 F.R. 47724 (Sept. 29, 1981) 9
H.R. 3200, 101st Cong., 1st Sess. (Aug. 3, 1989) .. 11
Jt. Hearings before the Select Committee on Aging and the Subcommittees on Employment Opportunities and Labor-Management Relations of the House Committee on Education and Labor, 101st Cong., 1st Sess. (Sept. 21, 1989) 13
Jt. Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources and the Special Committee on Aging, 101st Cong., 1st Sess., Serial No. 101-308 (Sept. 27, 1989) 12, 13
S. 1511, 101st Cong., 1st Sess. (Aug. 3, 1989) 11, 12
Sen. Rep. No. 101-263 (1990) 13

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, ("UAW") file this brief *amici curiae* in support of petitioner with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women. The UAW is the labor organization that negotiated the retiree health insurance plan challenged in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW" or "the Union") is the collective bargaining representative for a three facility bargaining unit of employees of General Dynamics Land Systems, Inc. ("General Dynamics" or "the Company"). This case concerns the retiree health insurance plan established by the collective bargaining agreement covering that bargaining unit in effect from July 1997 until October 2001.

Under that plan, workers who were 50 years or older on July 1, 1997 and retired after that date were provided with

---

[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

retiree health insurance, but workers who were younger than age 50 on July 1, 1997 and retired thereafter were not provided with such insurance.

The plaintiffs in this case have challenged this insurance plan under the Age Discrimination in Employment Act ("ADEA") on the grounds that the plan discriminated on the basis of age by providing retiree health insurance coverage for workers who were 50 or older but not for workers who were younger than 50.

The UAW and the AFL-CIO agree with the plaintiffs that all workers—and not just the oldest workers—are entitled to and should be provided with retiree health insurance by their employers. But no public law mandates such universal retiree health insurance and no labor relations law mandates that employers agree to provide such insurance in collective bargaining. That being so, it is our position that employers and labor organizations should be, and are, free—under the ADEA—to negotiate health insurance plans that favor older workers. And, it is our position that this reading of the ADEA protects the interests of all workers in this regard by giving necessary play to the collective bargaining process.

For these reasons, we agree with General Dynamics' position that the ADEA cannot be read to prevent employers and unions from negotiating agreements that provide better benefits to older workers than to younger workers. There are two statutory reasons for this:

- *First*, as the Company stresses in its brief, the ADEA cannot, in general, be read to create a cause of action for "reverse age discrimination," i.e., a cause of action on behalf of younger workers who claim that older workers have been treated better than them.

- *Second*, as we stress in this brief, Congress has addressed the precise issue of whether employee benefit plans may provide greater benefit payments to older workers than to younger workers in ADEA § 4(f)(2)(B)(i) and has expressly provided that employee benefit plans may prefer older workers in that way.

In the first point of our argument, we show that § 4(f)(2)(B)(i), read according to its plain terms, protects "any action" taken "to observe the terms of a bona fide employee benefit plan" where "the actual amount of [the benefit] payment made . . . on behalf of an older worker is *no less than* that made . . . on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added). And we further show that, by the plain meaning of the statutory language, a benefit plan that provides *greater* benefits to *older* workers than it does to younger workers is a plan protected by this section.

In the second point of our argument, we examine the legislative history of ADEA § 4(f)(2)(B)(i) and show that this reading of the statutory text according to its terms accurately reflects the intent of Congress in enacting that provision.

Finally, in the third point of our argument, we describe the circumstances surrounding the negotiation of the retiree health insurance provision at issue here to demonstrate concretely how ADEA § 4(f)(2)(B)(i) furthers the statutory purpose of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.SC. § 621(b).

ARGUMENT

In this case, the plaintiffs—General Dynamics employees who were, at the relevant time, between the ages of 40 and 50—"claim that their employer illegally discriminated against them on the basis of their age" in violation of the Age Discrimination in Employment Act by complying with the terms of a collective bargained retiree health insurance plan that "facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty,

who are entitled to retiree health care benefits, and employees under the age of fifty, who are not." Pet. App. 23a.

The district court dismissed the complaint on the ground "that a claim of reverse age discrimination[, such as that advanced by the plaintiffs,] is not cognizable under ADEA." Pet. App. 24a. The court of appeals held, to the contrary, that, "[b]y the plain language of the ADEA"—§ 4(a) of which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1)—the plaintiffs "are the victims of 'age discrimination,'" because "they were denied job benefits due to their age." *Id.* at 9a. The court of appeals majority acknowledged "that the facts of this case are unusual and fall outside the typical ADEA claim, in that the plaintiffs were younger than the employees who were to received health benefits upon retirement under the [plan]." *Id.* at 10a. But the court below concluded that it was "bound by the plain language of the statute" to reach the counterintuitive result it did, "[w]hatever the policy justifications for holding otherwise." *Id.* at 11a.

In this Court, General Dynamics focuses on the broad threshold issue of whether ADEA § 4(a) "provides a cause of action for employees within the protected class who claim that their employer discriminated against them on the basis of age because of the employer's more favorable treatment of older employees, also within the class." Pet. App. 2a. We agree with General Dynamics' position that ADEA § 4(a) does *not* create a cause of action against an employer for treating older workers more favorably than younger workers and with the Company's showing in support of that position.

Having said that, rather than address the threshold issue of whether the ADEA as a general matter makes "reverse age discrimination" unlawful, we address the narrower issue

raised by the plaintiffs' complaint in this case: whether the employer violated the ADEA by establishing a retiree health insurance plan that provides benefits to employees over the age of 50 and does not provide those benefits to similarly situated employees under that age. As we show, ADEA § 4(f)(2)(B)(i) grants express permission for an employer "to observe the terms of a bona fide employee benefit plan" where "the actual amount of [the benefit] payment made . . . on behalf of an older worker is *no less than* that made . . . on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added). That provision makes it plain that the employer action the plaintiffs complain of here does not constitute a violation of the ADEA.

1. Section 4(f)(2)(B)(i) provides in full:

> "It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * *
>
> "(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this [Act]—
>
> * * *
>
> "(B) to observe the terms of a bona fide employee benefit plan—
>
> "(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. § 623(f)(2)(B)(i).

Section 4(f)(2)(B)(i), thus establishes three conditions for treating as lawful actions taken pursuant to an employee benefit plan that would be "otherwise prohibited under [§ 4](a)." *First*, the action must be taken "to observe the

terms of a bona fide employee benefit plan." *Second*, "for each benefit or benefit package [under the plan], the actual amount of payment made or cost incurred on behalf of an older worker" must be "no less than that made or incurred on behalf of a younger worker." *Third*, the "benefit or benefit package" in question must be "permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)."

We now take up in turn each of the three § 4(f)(2)(B)(i) conditions and discuss their application to the General Dynamics retiree health insurance plan.

a. There is no question that the General Dynamics retiree health insurance plan is "a bona fide employee benefit plan" within the meaning of ADEA § 4(f)(2)(B)(i). "An 'employee benefit plan' is a plan, such as a retirement, pension, or *insurance plan*, which provides employees with what are frequently referred to as 'fringe benefits.'" 29 C.F.R. § 1625.10(b) (emphasis added). *See also* 29 U.S.C. § 1002(1) & (3) (defining the term "employee benefit plan" as used in ERISA to include health insurance plans). And, "[a] plan is considered 'bona fide' if its terms . . . have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan." 29 C.F.R. § 1625.10(b). The General Dynamics plan meets these two criteria.

b. Nor is there any question that, under the General Dynamics insurance plan, "the actual amount of payment made . . . on behalf of an older worker is *no less than* that made . . . on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added). The plaintiffs' claim is precisely that the plan violates the ADEA because the retiree health insurance plan makes payments on behalf of an older worker that are *greater* than the payments made on behalf of a younger worker. But that is what § 4(f)(2)(B)(i), in terms, permits: where the older worker's payment is *more* than the

younger worker's, "the actual amount of payment made . . . on behalf of an older worker" is most certainly "no less than that made . . . on behalf of the younger worker."

It is significant in this regard that § 4(f)(2)(B)(i) does *not* require "equal" benefit payments on behalf of older and younger workers, except to the extent that lower payments to older workers can be justified by higher relative costs. Rather, the statute protects "any action" taken "to observe the terms of a bona fide employee benefit plan," just so long as *either* the benefit "payment" made on behalf of an older worker is "no less than" that made on behalf of a younger worker *or* the "cost incurred" in making the older worker's benefit payment is "no less than" the cost incurred in making the younger worker's benefit payment.

c. The remaining question is whether a plan providing greater health insurance benefits to older workers is "permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. § 623(f)(2)(B)(i). The answer to that question is "yes."

Section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)—which has remained unchanged since 1989—contains the EEOC's interpretation of ADEA § 4(f)(2) as in effect on that date, i.e., the immediate predecessor to the current § 4(f)(2)(B)(i). As set out in the EEOC's 1989 regulation, ADEA § 4(f)(2) provided that it was not unlawful for an employer

> "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified by

section 12(a) of this Act because of the age of such individuals." 29 C.F.R. § 1625.10(a)(1).

The regulation "explain[s] three key elements of the [§ 4(f)(2)] exception:

> "(i) What a 'bona fide employee benefit plan' is;
>
> "(ii) what it means to 'observe the terms' of such a plan; and
>
> "(iii) what kind of plan, or plan provision, would be considered 'a subterfuge to evade the purposes of [the] Act.'" *Id.*

As we have previously shown, the General Dynamics insurance plan is, indeed, a "bona fide employee benefit plan" under the EEOC regulation. *See supra* p. 6.

It is equally plain that General Dynamics was "observ[ing] the terms" of the insurance plan, within the meaning of the EEOC regulation, in distinguishing between workers who were 50 or older on July 1, 1997 and those who were younger. The regulation defines "observ[ing] the terms" of a plan as taking "actions which are actually prescribed by the terms of a bona fide employee benefit plan." 29 C.F.R. § 1625.10(c).

And, it is beyond dispute that the General Dynamics retiree health insurance plan cannot be characterized as a "subterfuge to evade the purposes of th[e] Act" under the 1989 EEOC regulation's definition of a subterfuge. In this regard, the regulation provides that "a plan or plan provision which prescribes *lower benefits for older employees* on account of age is . . . a 'subterfuge' within the meaning of section 4(f)(2)," unless the employer can show "that the *lower level of benefits* is justified by age-related cost considerations." 29 C.F.R. § 1625.10(d) (emphasis added).[2] Under

[2] The EEOC regulation generally allows "cost comparisons and adjustments under section 4(f)(2) . . . [to] be made on a benefit-by-benefit basis or on a 'benefit package' basis, as described [in the regulations]." 29 C.F.R. § 1625.10(d)(2). However, "to justify reductions in health benefits," the regulation requires a "benefit-by-benefit approach" on the grounds that "[s]uch benefits appear to be of particular importance to older workers in meeting 'problems arising from the impact of age' and were of particular concern to Congress." 29 C.F.R. § 1625.10(f)(2)(iii), quoting 29 U.S.C. § 621(b).

the regulation, then, a plan can be characterized as "subterfuge" on the basis of differentials in benefit payments only if the plan "prescribes *lower* benefits for *older* employees on account of age." It follows ineluctably that an insurance plan that pays *higher* benefits to *older* workers cannot be so characterized and is "permissible" under the 1989 EEOC regulation.

All that being so, the action taken by General Dynamics in providing retiree health insurance coverage to certain older workers and not to certain similarly situated younger workers was taken pursuant to the Company's retiree health insurance plan and is lawful under § 4(f)(2)(B)(i).[3]

2. The legislative history of the 1990 amendments to the ADEA, adding § 4(f)(2)(B)(i) in its present form to the Act,

[3] As a general matter—and without regard to whether the action in question was taken pursuant to an "employee benefit plan"—the EEOC regulations allow preferences for older workers where the preference "will counteract problems related to age discrimination." 29 C.F.R. § 1625.2(b). The EEOC has explained that this exception is intended to "provide for a continuation of the flexible approach first announced in administrative Opinion Letters of the Department of Labor" approving contract provisions that, variously, "require that a certain number of positions be made available to an older segment of the protected age group" and provide "varying amounts of severance pay based, in part, on an employee's age." 46 F.R. 47724 (Sept. 29, 1981). The age distinction drawn by the collective bargaining agreement here is essentially similar to the age distinctions approved by these Department of Labor Opinion Letters. Thus, the Company's retiree health insurance plan passes ADEA muster by reason of the § 1625.2(b) regulation as well as by reason of ADEA § 4(f)(2)(B)(i).

strongly confirms that its statutory language was intended to mean what the words so clearly say.

Section 4(f)(2)(B)(i) as presently written was added to the ADEA by the Older Workers Benefit Protection Act of 1990. P.L. 101-433, § 103, 104 Stat. 978, 978-979 (1990). The 1990 ADEA amendments were enacted to overrule this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), and to thereby clarify the "congressional intent . . . to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." P.L. 101-433, § 101, 104 Stat. at 978.

a. In *Betts*, this Court rejected the definition of the "'subterfuge' exception to the § 4(f)(2) exemption" contained in § 1625.10 of the EEOC regulations. 492 U.S. at 172. The Court explained its rejection of the regulation's definition of "subterfuge," by observing that "[t]he term . . . includes a subjective element that the regulation's objective cost-justification requirement fails to acknowledge." *Id.* at 171.[4]

Having rejected the EEOC's definition of "subterfuge," the *Betts* Court went on to hold that a "plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act," i.e., unless the plan discriminates in some way *other* than in the provision of benefits. 492 U.S. at 176. On this basis, the Court concluded that § 4(f)(2) "exempt[s] the provisions of a bona fide benefit plan from the purview of the ADEA so long

[4] The *Betts* Court did accept, however, the definition of "employee benefit plan" contained in 29 C.F.R. § 1625.10(b). 492 U.S. at 174. In this regard, the Court noted that "[t]he statute's use of the phrase '*any* employee benefit plan' seems to imply a broad scope for the statutory exemption." *Id.* at 173 (emphasis in original).

as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id.* at 177.

b. On August 3, 1989—six weeks after the *Betts* decision—S. 1511 was introduced in the Senate for the express purpose of overruling *Betts* and reestablishing the rule contained in § 1625.10 of the EEOC regulations. 135 Cong. Rec. S9948-49 (1989). An identical bill was introduced on the same day in the House by Representative Hawkins. H.R. 3200, 101st Cong., 1st Sess. (Aug. 3, 1989). S. 1511 was the bill that Congress eventually enacted in the fall of 1990.

Insofar as is pertinent here, S. 1511 addressed the *Betts* decision in two steps. First, the bill defined the ADEA term "compensation, terms, conditions, or privileges of employment" to "encompass[] all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." S. 1511, 101st Cong., 1st Sess. § 3 (Aug. 3, 1989). Second, the bill replaced § 4(f)(2) of the ADEA, as amended in 1978, with a new version of that section that included a subsection (B) specifying that it was not unlawful

> "to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package (as permissible under section 1625.10, title 29, Code of Federal Regulations, as in effect on June 22, 1989), the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any

individual specified by section 12(a) of this Act because of the age of such individual." *Id.* § 4.

Both of these S. 1511 provisions remained virtually unchanged from the time S. 1511 was introduced until the time the bill was enacted into law. *See* 29 U.S.C. §§ 623(f)(2)(B)(i) & 630(l).

S. 1511 was drafted with the assistance of the EEOC. *See* 136 Cong Rec. S13240 (1990). At the Senate hearings on this bill, the representatives of the EEOC made clear that the amendments adding § 4(f)(2)(B) to the ADEA would permit an employer to provide *older* workers with *greater* benefits than the employer provides to *younger* workers.

The EEOC General Counsel stated, in so many words, that the bill would "permit[] an older employee to receive greater benefits or an employer to incur greater costs for an older than for a younger employee." Jt. Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources and the Special Committee on Aging, 101st Cong., 1st Sess., Serial No. 101-308, p. 62 (Sept. 27, 1989) ("Senate Hearings"). *See id.* at 67. Indeed, one of the reasons given by the EEOC for preferring S. 1511 over another pending bill designed to overrule *Betts* was precisely that

> "S. 1511 precludes a claim for benefits discrimination by a younger protected age group worker by making it clear that, where benefits are concerned, the ADEA allows an employer to extend additional benefits to older workers that are not extended to younger workers also protected by the ADEA." *Id.* at 431.

In other words, the EEOC advocated the enactment of S. 1511 in part because it would preclude the precise claim advanced by the plaintiffs in this case.[5]

---

[5] The testimony of the EEOC representatives appearing before the House Committees considering H.R. 3200 was to the same effect. *See* Jt. Hearings before the Select Committee on Aging and the Subcommittees on Employment Opportunities and Labor-Management Relations of the House Committee on Education and Labor, 101st Cong., 1st Sess. pp. 59, 64, 70, 77, 222 & 224 (Sept. 21, 1989).

The sponsors of S. 1511 made the same point as the EEOC representatives regarding the effect of this aspect of the bill. Thus, Senator Metzenbaum began the hearings on S. 1511 by explaining that under the bill, "[a]n employer must provide older workers with benefits *at least equal to* those provided for younger workers unless the employer can prove that the cost of providing an equal benefit is greater for an older worker than for a younger one." Senate Hearings 2 (emphasis added). *See id.* 3.

The Senate Report on S. 1511 explained:

> "The language of the bill requiring that the 'payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker' is designed to provide employers with the flexibility of incurring *greater* costs for benefits on behalf of older workers in appropriate circumstances." Sen. Rep. No. 101-263 p. 18 (1990) (emphasis in original).

And, a summary of the bill placed in the Congressional Record by the sponsors on the day the Senate took up S.1511 similarly explained that under the bill, "[a]n employer must provide older workers with benefits at least equal to those provided for younger workers, unless the employer can prove that the cost of providing an equal benefit is greater for an older worker than for a younger one." 136 Cong. Rec. S13241.

The proposition that"[a]n employer must provide older workers with benefits *at least equal* to those provided for younger workers," 136 Cong. Rec. S13241 (emphasis added), unless the employer could provide a cost justification for

providing the older employer with lower benefits, was not at all controversial. Thus, the portion of S. 1511 that amended ADEA § 4(f)(2) to add the present subsection (B)(i) was passed by the Senate without any change to the bill reported by the Senate Labor Committee.

There was, however, some disagreement in the Senate over whether S. 1511, as reported by the Senate Committee, provided employers with sufficient flexibility to provide for age-based early retirement incentives and for age-based integration of benefits. *See* 136 Cong. Rec. S9444 (Sen. Hatch). This disagreement was resolved by a compromise amendment to S.1511 agreed to by Senators Hatch and Metzenbaum. *Id.* at S13594 (Amendment No. 2759). The compromise amendment provided employers with somewhat greater flexibility to offer age-based early retirement incentives and to integrate benefit packages using age-based criteria. *Id.* at S13598. The amendment did not change the portion of S.1511 adding subsection (B)(i) to ADEA § 4(f)(2). *Id.* at S13594.

As amended by the Hatch/Metzenbaum compromise, S. 1511 passed the Senate on September 24, 1990 by a vote of 94 to 1. 136 Cong. Rec. S13611. The House took up the bill on October 2, and, after a brief debate on that date, passed S. 1511 without amendment on October 3 by a vote of 406 to 17. *Id.* at H8738. The bill was then signed into law by the President on October 16. Public Law No: 101-433.

3. It is very much to the point that ADEA § 4(f)(2)(B)(i) and the protections it provides in crafting employee benefit plans is one of Congress' means for furthering the statutory purpose of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The events leading to the consummation of the collective bargaining agreement provision at issue in this case demonstrate as much.

The instant case arises out of a long running dispute between the UAW and General Dynamics over who should bear the costs of health insurance for both active and retired workers at the Company's three defense production facilities. Up until 1994, the UAW agreements with General Dynamics covering these facilities provided full health insurance coverage for both active employees and retirees. These health insurance provisions were carried over from the Union's agreements with Chrysler Corporation, which had owned these facilities prior to their acquisition by General Dynamics in 1982.

Shortly after acquiring the three facilities, General Dynamics began demanding concessions from the UAW with respect to health insurance coverage. The Company's principal argument was that its competitors in the defense industry were not providing comparable coverage for their employees and that the resulting difference in labor costs put General Dynamics at a disadvantage in bidding on defense work.

The Union successfully resisted General Dynamics' demands for health insurance concessions until 1994. In the negotiations for the 1994-97 agreement, the Company demanded that the health insurance plan cover only 80% of approved medical expenses and that health insurance for future retirees be ended entirely. The Company had implemented similar measures with respect to non-union employees in 1993. Health care cost was the principal area of disagreement between the UAW and General Dynamics during the 1994 negotiations, and the workers endured an eight week strike, rather than accede to the Company's demands. In the end, the Union was successful in maintaining health insurance coverage for future retirees, and the Union and the Company agreed on a provision for a 10% co-pay on medical claims for active employees and for future retirees.

The issue of health care cost was again at the center of the negotiations for the 1997 collective bargaining agreement. General Dynamics demanded a 20% co-pay on medical claims for active employees and present retirees and the elimination of health insurance for future retirees.

In the 1997 round of negotiations, the Company's ability to achieve health insurance cuts was strengthened by the recession in the defense industry. And, the Union's ability to resist the Company's demands in this regard was correspondingly weakened. One measure of how the Union's bargaining strength had been sapped is that the number of workers then employed in the UAW bargaining unit at the three facilities had declined to 500 workers from the 7,500 workers that were employed when General Dynamics acquired the facilities in 1982. In those circumstances, the Union concluded that it could not replicate its successful 1994 strike that had saved health insurance for all future retirees.

What the Union was able to work out with the Company, however, was a compromise that saved retiree health insurance for a substantial portion of the workforce. The Union did so by negotiating the provision—challenged in this lawsuit—that continued such insurance for future retirees who were at least 50 years old on July 1, 1997, the effective date of the new agreement. The older workers protected by this provision constituted forty percent of the active workforce at that time.

In the Union's view, protecting the expectations of the older workers was a first priority, because the UAW/General Dynamics agreement provides for retirement after 30 years of service and these older workers were, therefore, the ones most likely to be eligible for early retirement in the near future.[6] For a variety of reasons, including the applicable state

[6] Early retirement is also available to workers who are 60 years old and have at least ten years of service. Workers who are laid off for at least 60 days and who are at least 50 years old can, during their period of lay off, elect to take early retirement at age 55, if they have ten years of service. The normal retirement age under the General Dynamics pension plan is 65.

labor laws and the Vietnam era military draft, as of 1997 few workers would be able to meet the thirty year service requirement before age 50.

Whether the right to early retirement is real depends, in large part, on the availability of retiree health insurance coverage. In 1997, a retiree with thirty years of service at General Dynamics could retire with a monthly pension payment of approximately $2000. The monthly premium for health insurance comparable to that provided by the General Dynamics plan was, at that time, approximately $700. Thus, elimination of retiree health insurance coverage would reduce the expected disposable income of a General Dynamics retiree by more than one-third. The loss of that much expected income would obviously cause a significant number of older workers, who had been planning to take advantage of the early retirement option, to abandon that plan and remain in active employment.

The effects of such a change in plans by older workers go beyond their disappointment at not being able to retire at the time they had expected. Lay-offs under the UAW/General Dynamics agreement are by seniority. And in a recessionary economy, the decision of an older worker to forego early retirement directly threatens the employment security of younger bargaining unit workers. Thus, by protecting the retirement expectations of the older bargaining unit workers, the Union was also protecting the employment security of the younger workers.

On the plaintiffs' view of the ADEA, the bargaining between the UAW and General Dynamics would have been restricted to the all or nothing proposition that either all future

retirees would receive health insurance or none would. In the circumstances of the 1997 negotiations, the result could well have been that health insurance for future retirees would have been eliminated entirely. In this context, ADEA § 4(f)(2)(B)(i) enabled the parties to reach a compromise that provided health insurance coverage to the older group of workers whose close proximity to retirement made them most in need of such coverage and whose settled retirement expectations were most likely to be seriously upset by the precipitous elimination of such coverage. It is plain beyond dispute that allowing employers and unions to negotiate such compromises that protect older workers accords well with the purposes of the ADEA.

CONCLUSION

The decision of the court of appeals should be reversed and the judgment of the district court dismissing the complaint should be reinstated.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

DANIEL W. SHERRICK
MICHAEL F. SAGGAU
8000 East Jefferson Avenue
Detroit, MI 48214

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

THOMAS C. NYHAN
Executive Director/ General Counsel
JAMES P. CONDON
Deputy General Counsel
JOHN J. FRANCZYK, JR.*
Associate General Counsel
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Amicus Curiae Central States, Southeast and Southwest Areas Health and Welfare Fund

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF CENTRAL STATES	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Cline v. General Dynamics Land Systems, Inc., 296 F.3d 466 (6th Cir. 2002)	4, 5, 9
Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995)	10
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)	7
Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992)	4
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	6
Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988)	9
Keene Corp. v. United States, 508 U.S. 200 (1993)	7
Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)	5
Lyon v. Ohio Educ. Ass'n & Professional Staff Union, 53 F.3d 135 (6th Cir. 1995)	9
O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)	6
Schuler v. Polaroid Corp., 848 F.2d 276 (1st Cir. 1988)	4
United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001)	5
CONSTITUTIONAL PROVISIONS	
U.S. Const. Art. I, § 2, cl. 2	7
U.S. Const. Art. I, § 3, cl. 3	7
U.S. Const. Art. II, § 1, cl. 5	7

TABLE OF AUTHORITIES—Continued

STATUTES	Page
29 U.S.C. § 621	2, 5, 6
29 U.S.C. § 623(a)(1)	5
29 U.S.C. § 623(f)(2)(B)(i)	2, 8
29 U.S.C. § 623(i)	2
29 U.S.C. § 623(l)	2
29 U.S.C. § 623(l)(1)(A)	5, 9
29 U.S.C. § 1002(1)	1
29 U.S.C. § 1002(3)	1
29 U.S.C. § 1002(37)(A)	1
REGULATIONS	
29 C.F.R. § 1625.2(a)	5, 7
29 C.F.R. § 1625.2(b)	8
29 C.F.R. § 1625.10(a)(1)	8

IN THE

Supreme Court of the United States

No. 02-1080

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF CENTRAL STATES

Central States is an "employee welfare benefit plan," and "employee benefit plan," and a "multiemployer plan" within the meaning of Sections 3(1), 3(3), and 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1), 1002(3), and 1002(37)(A).[1] Central States provides health benefits to approximately 100,000 active participants and approximately 25,000 retirees. In

[1] Pursuant to Rule 37.6, Central States represents that this brief has been authored solely by counsel for Central States and no party other than Central States has made a monetary contribution for the preparation or submission of this brief.

general terms, the cost of providing health coverage increases as participants get older. Thus, the cost of providing health coverage to retirees is relatively high as compared to active participants (who have a much younger average age as a group). Within each group, average costs increase as well depending upon the age of the participant and retiree.

Because the average cost of providing health coverage in general, and to retirees in particular, is growing at an astronomical rate, an employee welfare plan such as Central States has only three options. First, Central States could eliminate coverage for retirees that would, in many instances, eliminate the only affordable health coverage that the retirees could acquire. Second, Central States could charge a premium to the retirees reflecting the full cost of providing health coverage. However, this cost would be prohibitively high for most of the retirees. Third, Central States could charge higher premiums to younger active participants or younger retirees in order to subsidize the cost of the health coverage provided to the older retirees.

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 621-634, contains provisions that have bearing on the provision of welfare benefits and pension benefits by employers. For example, Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), allows an employer to observe the terms of a bona fide employee benefit plan where the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. Other examples are Sections 4(i) and 4(l) of the ADEA, 29 U.S.C. §§ 623(i) and 623(l), which allow pension plans to contain various age-based terms. Prior to the decision below, health benefit plans believed (and courts held) that discrimination *in favor of* older persons did not violate the ADEA. The decision below, if left intact, will make it

difficult, if not impossible, for health plans to continue to provide retiree health coverage (at least without making the premiums cost prohibitive to the retirees), to the extent discriminating *in favor of* older persons is a violation of the ADEA. Such an interpretation of the ADEA is contrary to the language in the ADEA that states that the policy underlying the ADEA is to protect older workers.

SUMMARY OF ARGUMENT

The decision below gives insufficient weight to the policy statements contained in the ADEA. Although the Sixth Circuit justified not following the policy statements by resorting to what it considered more specific language prohibiting discrimination on the basis of age, the Sixth Circuit never considered the implications of the ADEA's limitation of the protected class to those individuals 40 years and over. When that specific language is taken into account as well, the Sixth Circuit's reading of the statute to prohibit discrimination against younger workers makes the statute irrational.

The Sixth Circuit also relied on the ADEA's regulations for the proposition that discrimination against younger workers is prohibited. Yet the very section upon which the Court relied contains another subsection that allows discrimination in favor of older workers. Further, although the ADEA itself provides that an employee benefit plan does not violate the statute if the cost incurred on behalf of, or benefit provided to, older workers is *no less than* that provided to younger workers, a section of the regulations contradicts the statute by requiring that the cost incurred or benefit provided be *equal*. As a result, reliance on the regulations as a means of interpreting the statute is hazardous at best.

Similarly, the fact that the ADEA permits the use of a minimum age requirement for eligibility in a pension plan does not indicate that the statute prohibits discrimination in favor of older workers. The provision does not become

meaningless if the ADEA does not prevent discrimination in favor of older workers because that provision would still foreclose an argument by an older worker that a minimum age requirement was set too low in a way that disfavors older workers.

Finally, reading the ADEA to prohibit discrimination in favor of older workers will likely result in the reduction or elimination of health benefits to older workers and retirees. Plans that have relied on higher premiums paid by younger workers will now be forced to either decrease or eliminate benefits or to charge a prohibitively high premium to older workers and retirees. Such a result would defeat the ADEA's goal of protecting older workers. For these reasons, the Court should reverse the Sixth Circuit's judgment.

ARGUMENT

The Sixth Circuit's holding in *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002), that the ADEA prohibits reverse age discrimination, conflicts with the Seventh Circuit's holding to the contrary in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992); *see also Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.) (stating in dicta that the ADEA "does not forbid treating older persons *more* generously than others"). The Sixth Circuit's holding that the ADEA prohibits discrimination *in favor of* older workers has consequences far beyond the specific context of the case before the Court. The Sixth Circuit's decision, if not reversed by this Court, may make it difficult, if not impossible, for health plans to provide health coverage to older workers, as well as retirees, because many plans depend on younger workers to subsidize the cost of providing coverage to older workers. Moreover, as demonstrated below, the Sixth Circuit's result cannot be squared with a reading of the ADEA in its entirety.

The Sixth Circuit relied on two principal arguments in support of its conclusion that the ADEA prohibits reverse age discrimination. First, the Sixth Circuit relied on the argument that the ADEA prohibits discrimination against any individual because of such individual's age. *Cline*, 296 F.3d at 469; 29 U.S.C. § 623(a)(1). Although the Sixth Circuit acknowledged that the statute also expresses that the purpose of the statute is to protect older workers, 29 U.S.C. § 621, the Sixth Circuit believed that the specific language of the statute governed over the more general provision. *Cline*, 296 F.3d at 470-71. Second, the Sixth Circuit relied upon the argument that a regulation promulgated by the EEOC, 29 C.F.R. § 1625.2(a), indicates that discrimination is prohibited by the ADEA even if the discrimination is in favor of an older worker. *Cline*, 296 F.3d at 471. The concurrence relies on yet a third argument, namely, that the provision in the ADEA which allows an employer to set a minimum age as a condition for eligibility in a pension plan, 29 U.S.C. § 623(l)(1)(A), would be meaningless if discrimination against younger employees was not prohibited by the ADEA. *Cline*, 296 F.3d at 473 (Cole, J., concurring). However, none of these arguments withstands scrutiny.

The Sixth Circuit was certainly correct in stating, as a general interpretive principle, that the specific language of the statute governs the general. However, the Sixth Circuit ignored the canon that interpretation of a statute is a holistic endeavor and that the meaning of one provision of the statute must be compatible with the rest of the law. *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001). Although the Sixth Circuit correctly noted that the ADEA's protected class of individuals is limited to those individuals that are at least 40 years of age, the Sixth Circuit did not fully explore the implication of this fact. Although age is not a suspect classification under the Equal Protection Clause, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83

(2000), there must still be rational connection between the policy underlying the age discrimination and the interest sought to be served.

In this case, Congress sought to protect older workers in enacting the ADEA. 29 U.S.C. § 621. However, it did not seek to do so in a vacuum. As this Court has previously recognized, Congress enacted the ADEA to counteract the effect of "inaccurate and stigmatizing stereotypes" that older workers did not perform as well as younger workers. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993). Under rational basis review, Congress was certainly free to create a protected class of individuals 40 and older if Congress was seeking to counteract the stereotype that older workers did not perform as well as younger workers. In contrast, it would not be rational for Congress to limit the protected class to individuals 40 and over if Congress intended to protect individuals because of their youth. In this scenario, the younger the worker, the more likely the worker would be subject to such discrimination, meaning that limiting the protected class to individuals 40 and over would be entirely irrational. Just as this Court recognized in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-13 (1996), the difference in age between an individual and the person who replaced the individual, not the age of the worker or his replacement, is a reliable indicator of age discrimination. The relevant test under the ADEA for whether an employee was discriminated against because he was too young would be whether the employee was substantially younger than the person receiving more favorable treatment.

However, under the ADEA, such a result would be impossible because the younger employees would be outside the protected class. It is not rational to conclude that Congress sought to prevent discrimination against *younger* workers while at the same time limiting the protected class to those individuals 40 and older. It would be precisely those individuals *below* the age of 40 that would be more likely to need such protection. In fact, although Congress found that discrimination against older workers was founded on inaccurate stereotypes, no such finding was made with respect to discrimination against younger workers. The Constitution itself "discriminates" against the young in various circumstances. U.S. Const. Art. I, § 2, cl. 2 (Representative must be 25 or older); U.S. Const. Art. I, § 3, cl. 3 (Senator must be 30 or older); U.S. Const. Art. II, § 1, cl. 5 (President and Vice-President must be 35 or older). If Congress felt that such "discrimination" against younger individuals was merely an inaccurate stereotype, certainly it would have made such belief plain. *Cf. Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (Court does not presume a change in existing substantive law unless intent to make such a change is clearly expressed). Thus, construing the ADEA to bar reverse discrimination when the class of individuals protected is arbitrarily limited to those individuals age 40 or above creates an irrationality that would call the ADEA's constitutionality into question. The Court should avoid such a construction of the statute that creates serious constitutional doubt unless such construction is plainly the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, however, the statute itself makes it clear that Congress' intent was to protect older workers from being discriminated against because of the inaccurate stereotype that older workers could not perform their jobs as well as younger workers. Nowhere is there any suggestion that Congress believed the converse to be true.

Second, the Sixth Circuit also relied upon the fact that the regulations, specifically 29 C.F.R. § 1625.2(a), indicate that an employer may not discriminate against persons in the protected class on the basis of age regardless of whether the discrimination is in favor of the older worker. From this, the Sixth Circuit concluded that the EEOC interpreted the statute

to mean that discrimination in favor of older workers is prohibited. However, the Sixth Circuit did not address the next subsection of the same regulation that provides in pertinent part:

> The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination.

29 C.F.R. § 1625.2(b). If, as the Sixth Circuit asserts, the ADEA prohibits age discrimination regardless of whether the discrimination favors older workers, Section 1625.2(b) would conflict with the statute since discriminating in favor of older workers would still amount to age discrimination barred (under the Sixth Circuit's view) by the ADEA. Yet Section 1625.2(b) implicitly recognizes that doing an act that would benefit older workers is *not* a violation of the ADEA even if the employer is using age as a criterion. In short, the regulations are far from clear in stating a coherent picture as to the meaning of the statute.

Other conflicts exist between the statutory language of the ADEA and its regulations. Under the ADEA, it is lawful for an employer to observe the terms of a bona fide employee benefit plan where "the actual cost incurred on behalf of an older worker *is no less* than that made or incurred on behalf of a younger worker. . . ." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added). However, the regulations provide that "[a] benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, on behalf of a older worker *is equal to* that made or incurred on behalf of a younger worker. . . ." 29 C.F.R. § 1625.10(a)(1) (emphasis added). Thus, the statute allows the cost incurred on behalf of, or the benefit to, the older worker to be no less than that of a younger worker (which would allow the cost incurred, or benefit to, an older worker

to be *greater* than that made or incurred on behalf of a younger worker. However, the regulation requires that the cost incurred or benefit given to an older worker be *equal to* that of a younger worker. This contradiction between the statute and the regulation, in addition to the conflict within the regulations previously discussed, makes reliance on the regulations as an interpretive tool suspect.

Third, the concurrence in *Cline* relied upon the fact that the ADEA permits a pension plan to use a minimum age requirement for eligibility in the plan. 29 U.S.C. § 623(l)(1)(A). From this fact, the concurrence reasoned that the ADEA must prohibit reverse age discrimination because otherwise there would be no need for such a provision. However, as demonstrated by cases such as *Lyon v. Ohio Educ. Ass'n & Professional Staff Union*, 53 F.3d 135 (6th Cir. 1995), and *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), older workers may argue that setting a minimum age too low discriminates against older workers because it may allow younger workers to receive the same benefit as older workers even though the older workers have worked for the employer for a longer period of time.

Finally, recognizing a claim of reverse age discrimination under the ADEA would undermine the goal of the ADEA to protect older workers. As noted by the Seventh Circuit in *Karlen*, recognizing reverse age discrimination claims would deter employers from offering programs that are beneficial to older workers. 837 F.2d at 317-18. Further, it may prevent health plans from using higher premiums from younger workers to subsidize benefits for older workers resulting either in eliminating coverage for older workers and retirees or increasing the premium for older workers and retirees to a cost prohibitive level. The ADEA should not be read in such a way as to defeat its goal of protecting older workers. *See*

Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20 (1995) (elementary rule of construction is that an act may not be construed to destroy itself).

CONCLUSION

For the reasons stated, the Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

THOMAS C. NYHAN
Executive Director/
General Counsel
JAMES P. CONDON
Deputy General Counsel
JOHN J. FRANCZYK, JR.*
Associate General Counsel
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
HEALTH AND WELFARE FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Amicus Curiae
Central States, Southeast and
Southwest Areas Health and
Welfare Fund

Supreme Court, U.S.
FILED
AUG 29
SEP
CLERK

No. 02-1080

In the Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC., PETITIONER

v.

DENNIS CLINE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENTS

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

IRVING L. GORNSTEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ERIC S. DREIBAND
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ROBERT J. GREGORY
Senior Attorney

SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether, in the absence of an affirmative defense, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(a)(1), prohibits an employer from favoring older over younger workers when both are protected by the Act.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	2
Summary of argument	5
Argument	7
In the absence of an affirmative defense, the ADEA prohibits an employer from favoring older over younger workers when both are protected by the Act	7
A. The text of the ADEA generally prohibits an employer from favoring older over younger protected workers	8
B. Other sources of legislative intent confirm that the ADEA generally prohibits an employer from favoring older over younger protected workers	14
C. Petitioner's reliance on *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), is misplaced	20
D. The ADEA's general prohibition against age discrimination does not endanger bona fide benefit plans that favor older over younger protected workers as long as they satisfy the requirements of 29 U.S.C. 623(f)(2)(B)(i)	22
E. The EEOC has interpreted the ADEA to prohibit an employer from favoring older over younger protected workers, and its interpretation warrants deference	26
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Barnhart v. *Walton*, 535 U.S. 212 (2002) 29
Burt v. *Bentsen*, No. 01942163, 1994 WL 735377 (E.E.O.C. Apr. 29, 1994) 28
Chevron U.S.A. Inc. v. *Echazabal*, 536 U.S. 73 (2002) 29
Chevron U.S.A. Inc. v. *Natural Res. Def. Counsel*, 467 U.S. 837 (1984) 26
Dunn v. *Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997) 13
DuPriest v. *Bentsen*, No. 01942145, 1994 WL 1755951 (E.E.O.C. May 2, 1994) 28
Edelman v. *Lynchburg College* 535 U.S. 106 (2002) 29
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 9
Garrett v. *Runyon*, No. 01960422, 1997 WL 574739 (Sept. 5, 1997), aff'd in relevant part on reconsidera tion, No. 01960422, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999) 27
H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) 15
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) 8
Isabella v. *Runyon*, No. 01944083, 1995 WL 653513 (E.E.O.C. Oct. 19, 1995) 27
McDonald v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273 (1976) 16, 21
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 20, 21
Muscarello v. *United States*, 524 U.S. 125 (1998) 9
National Org. for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) 15
North Haven Bd. of Educ. v. *Bell*, 456 U.S. 512 (1982) 19

Cases—Continued: Page

O'Connor v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996) 17, 20, 22, 29
Oncale v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) 15, 16, 26
Pittsburgh Press Co. v. *Human Relations Comm'n*, 413 U.S. 376 (1973) 10
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 9
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 28
Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 29
TWA v. *Thurston*, 469 U.S. 111 (1985) 22
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 29
United States v. *Turkette*, 452 U.S. 576 (1981) 12
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 25
Western Air Lines, Inc. v. *Criswell*, 472 U.S. 400 (1985) 11

Constitution, statutes and regulations:

U.S. Const. Amend. I 10
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 2
29 U.S.C. 621 ..... 4, 5, 15
29 U.S.C. 621(a)(1) 10, 12, 14
29 U.S.C. 621(b) 15
29 U.S.C. 623(a) 10, 11
29 U.S.C. 623(a)(1) ..... *passim*
29 U.S.C. 623(e) 5, 10
29 U.S.C. 623(f) 11
29 U.S.C. 623(f)(1) 5, 11, 12
29 U.S.C. 623(f)(2) 23, 24
29 U.S.C. 623(f)(2)(B) 23
29 U.S.C. 623(f)(2)(B)(i) (§ 4(f)(2)(B)(i)) 6, 7, 12, 13, 22, 23, 24, 25
29 U.S.C. 623(*l*) 6, 13
29 U.S.C. 623(*l*)(1)(A) 4, 13, 28

Statutes and regulations—Continued: Page

29 U.S.C. 625 note 1, 26
29 U.S.C. 626 ..... 1, 26
29 U.S.C. 628 ..... 1, 26
29 U.S.C. 631 ..... 4, 5, 8, 15
29 U.S.C. 631(a) 2, 3
29 U.S.C. 633a 2
29 U.S.C. 633a(a) 27
29 U.S.C. 633a(b) 27
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 6, 16, 21
42 U.S.C. 2000e-2(a) 6
42 U.S.C. 2000e-2(a)(1) 16
Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 22
29 C.F.R.:
Section 860.91 (1968) 27
Section 1625.2(a) 1, 26
Section 1625.2(b) 24, 27
Section 1625.10 (1988) 24

Miscellaneous:

Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision: Joint Hearing Before House Select Comm. on Aging and the Subcomms. on Employment Opportunities and Labor-Management Relations of the Comm. on Education and Labor, 101st Cong., 1st Sess. (1989) 24-25
Black's Law Dictionary (5th ed. 1979) 9
113 Cong. Rec. 31,255 (1967) 19
Letter WH-30, 1970 WL 26398 (DOL May 1, 1970) 28
Letter WH-36, 1970 WL 26404 (DOL May 25, 1970) 28
Letter WH-389, 1976, WL 41742 (DOL May 1, 1976) 28
Letter WH-404, 1976 WL 41753 (DOL Aug. 26, 1976) 28
Letter WH-451, 1978 WL 51448 (DOL Jan. 31, 1978) 28

Miscellaneous—Continued: Page

Older Workers Benefit Protection Act: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and Special Comm. on Aging, 101st Cong., 1st Sess. (1989) 24
S. Rep. No. 723, 90th Cong., 1st Sess. (1967) 18
The American Heritage Dictionary (3d ed. 1992) 8, 9
The Oxford American Dictionary and Language Guide (1999) 8, 9
The Random House Dictionary of the English Language (1967) 9
Webster's Third New International Dictionary (1993) 8, 9

In the Supreme Court of the United States

No. 02-1080

GENERAL DYNAMICS LAND SYSTEMS, INC., PETITIONER

v.

DENNIS CLINE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case presents the question whether, in the absence of an affirmative defense, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(1), prohibits an employer from favoring older over younger workers when both are protected by the Act. The United States has a substantial interest in the resolution of that question. The Equal Employment Opportunity Commission (EEOC) has responsibility for enforcing the ADEA and for issuing regulations to carry out its purposes. 29 U.S.C. 625 note, 626, 628. Following notice and comment, the EEOC in 1981 issued a regulation that provides that it is unlawful for an employer to prefer one worker in the protected group over another in the protected group based on either individual's age. 29 C.F.R. 1625.2(a). The decision in this case will affect

the validity of that regulation. The United States is also required by a separate provision of the ADEA to make personnel decisions affecting individuals who are at least 40 years of age free from any discrimination based on age. 29 U.S.C. 633a. The decision in this case could affect that statutory responsibility.

STATEMENT

Before July 1, 1997, the collective bargaining agreement between General Dynamics Land Systems, Inc. (petitioner) and the United Auto Workers (UAW) required petitioner to provide full health benefits to all retired workers who had accumulated 30 years of seniority. Pet. App. 2a-3a. Petitioner and the UAW negotiated a new agreement that became effective on July 1, 1997. *Id.* at 3a. Under the new agreement, only workers who were 50 years of age or older on July 1, 1997, remained eligible for full health benefits when they retired. *Ibid.*

A group of petitioner's employees who were between the ages of 40 and 49 on July 1, 1997 (respondents) filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner's new retiree health benefit plan discriminated against them on the basis of age, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA's protections extend to "individuals who are at least 40 years of age." 29 U.S.C. 631(a).

The EEOC determined that there was reason to believe that petitioner's agreement to provide retiree health benefits only to individuals who were at least 50 years of age on

July 1, 1997, violated the ADEA, and it invited petitioner to resolve the matter informally. J.A. 16-17. Respondents then filed suit in federal district court, challenging petitioner's age limitation on retiree health benefits as a violation of the ADEA. Pet. App. 3a. Respondents are 183 current employees who are no longer eligible for retiree health benefits; 10 employees who retired before July 1, 1997, in order to receive full health benefits; and three employees who retired after July 1, 1997, and are ineligible for health benefits. *Ibid.* Respondents sought declaratory and monetary relief. J.A. 13-14.

Petitioner filed a motion to dismiss for failure to state a claim, arguing that the ADEA does not forbid an employer from favoring older over younger protected workers. Pet. App. 22a. The district court granted the motion. *Id.* at 21a-25a. The court concluded that petitioner's collective bargaining agreement "facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty, who are entitled to retiree health care benefits, and employees under the age of fifty, who are not." *Id.* at 23a. The court nonetheless ruled against respondents on the ground that "a claim of reverse age discrimination is not cognizable under ADEA." *Id.* at 24a. The court reasoned that "Congress' purpose in enacting [the] ADEA was to address the problems faced by *older* workers, not workers who suffer discrimination because they are too young." *Ibid.*

The court of appeals reversed. Pet. App. 1a-20a. It noted that 29 U.S.C. 623(a)(1) protects "any individual" from employment discrimination "because of such individual's age," and that 29 U.S.C. 631(a) defines protected individuals as "individuals who are at least 40 years of age." Pet. App. 6a. That statutory language, the court concluded, unambiguously prohibits an employer from discriminating against individuals who are at least 40 by favoring workers who are older. *Ibid.*

The court of appeals discerned no conflict between that conclusion and the declarations in the ADEA's statement of findings and purpose, 29 U.S.C. 621, that the ADEA was designed to protect "older workers." Pet. App. 7a-8a. The court explained that "[i]n § 621, Congress declared its intention to protect older workers, and in § 623 and § 631, it identified the older workers it intends to protect as 'any individual' age 40 or older." *Id.* at 9a.

The court also noted that the EEOC has interpreted the ADEA to forbid an employer from favoring older over younger protected workers. Pet. App. 10a. The court was "persuaded that the EEOC's interpretation of the ADEA is a true rendering of the language." *Ibid.* The court added that "[i]f Congress wanted to limit the ADEA to protect only those workers who are *relatively* older, it clearly had the power and acuity to do so." *Id.* at 11a.

In a concurring opinion, Pet. App. 12a-18a, Judge Cole concluded that while Congress was most concerned with discrimination that favors younger over older employees, "Congress's choice of language, whether specifically intended or not, also prohibits age discrimination that favors older over younger protected employees." *Id.* at 12a. In reaching that conclusion, Judge Cole relied not only on 29 U.S.C. 623(a)(1) and 631, but also on 29 U.S.C. 623(*l*)(1)(A), which authorizes an employer to set a minimum age as a condition for eligibility in a pension plan. Pet. App. 14a. Judge Cole explained that "[i]f younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in § 623(*l*)(1)(a) would not be necessary." *Ibid.*

Judge Williams dissented. Pet. App. 18a-20a. Relying on Section's 621's statement that the ADEA is intended to protect "older workers," he concluded that the ADEA permits an employer to favor older over younger protected workers. *Ibid.*

SUMMARY OF ARGUMENT

The ADEA makes it unlawful for an employer to "discriminate against any individual * * * because of such individual's age," 29 U.S.C. 623(a)(1), and extends the Act's protections to "individuals who are at least 40 years of age." 29 U.S.C. 631. Under the most straightforward interpretation of that statutory text, it is unlawful for an employer to favor one worker who is at least 40 over another worker who is at least 40 because of either individual's age. To justify such discrimination, an employer must invoke one of the ADEA's affirmative defenses.

A. Petitioner contends that the term "age" in the ADEA actually means "old age," confining the reach of the ADEA to discrimination because of an individual's old age. Petitioner relies on several dictionaries that give "old age" as a secondary meaning of the term "age." But the original and most common meaning of "age" is the length of time a person has lived, and that is the way that Congress used the term throughout the ADEA. Indeed, the ADEA cannot function harmoniously otherwise.

Under petitioner's interpretation, an employer would be forbidden from placing an advertisement that indicates a hiring preference for persons based on old age, see 29 U.S.C. 623(e), but the employer would be free to commit the very discriminatory act that it could not advertise. Petitioner's interpretation would also render the BFOQ defense a nullity. See 29 U.S.C. 623(f)(1). An employer could invoke the BFOQ defense *only* when it wished to justify a preference for persons *over* a certain age, but, under petitioner's interpretation, that preference does not violate the ADEA's basic prohibition to begin with.

Moreover, if Congress had intended to limit the ADEA to discrimination because of an individual's *older* age, it could have easily accomplished that goal by adding the single

word, "older" to the ADEA's basic prohibition. Congress's failure to make that addition is particularly revealing because Congress used the term "older" in one of the ADEA's affirmative defenses to make clear that employers could favor older over younger protected workers in certain limited circumstances. See 29 U.S.C. 623(f)(2)(B)(i). Petitioner's interpretation would also make the provision authorizing an employer to establish minimum age limits for pension benefits superfluous. See 29 U.S.C. 623(*l*).

B. The ADEA's prohibition against discrimination that favors older over younger protected workers is consistent with Congress's statement that it was seeking to protect "older" workers and promote their employment "based on their ability rather than age." 29 U.S.C. 621. Under the ADEA, the "older" workers Congress sought to protect from arbitrary age discrimination are "individuals who are at least 40 years of age." 29 U.S.C. 631.

Indeed, Congress expressly modeled the ADEA on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). In Title VII, Congress enacted a prohibition that protects any individual against discrimination because of race and sex, even though the principal problem that Congress sought to redress was discrimination based on a person's minority race and female sex. In the same way, Congress in the ADEA enacted a prohibition that protects any individual in the protected class against discrimination because of age, even though the principal problem that Congress sought to redress was discrimination directed at individuals based on their older age. The legislative history confirms that conclusion. In a considered statement, one of the ADEA's sponsors made clear that the ADEA prohibits discrimination between members of the protected class, regardless of whether the relatively older or relatively younger worker is favored.

C. Giving the ADEA that interpretation need not endanger health plans that are common among employers. The

ADEA, taken as a whole, both prohibits discrimination against younger workers in the protected class "because of age," and, through affirmative defenses, provides special accommodations for certain benefits. One of those affirmative defenses authorizes an employer to give different levels of benefits to older workers in the protected class when certain specific requirements are satisfied. See 29 U.S.C. 623(f)(2)(B)(i). Because petitioner did not raise that defense in its motion to dismiss in the district court or on appeal, and neither court addressed it, the question whether petitioner can satisfy the requirements of Section 623(f)(2)(B)(i) is not presented here. But the affirmative defense remains available to petitioner in district court.

D. Finally, after notice and comment, the EEOC issued a regulation that makes it unlawful to discriminate between two members of the protected class because of either individual's age. That interpretation accurately reflects Congress's clearly expressed intent and confirms that the ADEA generally prohibits all discrimination against protected workers because of age, not just discrimination because of an individual's older age.

ARGUMENT

IN THE ABSENCE OF AN AFFIRMATIVE DEFENSE, THE ADEA PROHIBITS AN EMPLOYER FROM FAVORING OLDER OVER YOUNGER WORKERS WHEN BOTH ARE PROTECTED BY THE ACT

Petitioner contends that the ADEA does not forbid an employer from intentionally favoring relatively older workers over employees who are younger but nonetheless protected by the Act. That contention is incorrect. In general, the ADEA forbids such age discrimination in employment. An employer that wishes to discriminate in that way may do so only when justified by one of the ADEA's affirmative defenses. Although the ADEA's affirmative defenses permit

benefit plans to favor relatively older workers if certain conditions are met, the ADEA generally prohibits age-based discrimination in advertising, hiring, promotion, and firing.

A. The Text Of The ADEA Generally Prohibits An Employer From Favoring Older Over Younger Protected Workers

1. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age.*" 29 U.S.C. 623(a)(1) (emphasis added). The Act's protections extend to "individuals *who are at least 40 years of age.*" 29 U.S.C. 631 (emphasis added). Under the most natural reading of that statutory text, it is unlawful for an employer to favor one worker who is at least 40 over another worker who is at least 40 based on age, regardless of whether the favored individual is younger or older. In either case, the preference constitutes discrimination against a protected individual "because of such individual's age," 29 U.S.C. 623(a)(1), and violates the employer's duty under the ADEA "to ignore an employee's age." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993).

Relying on several dictionary definitions, petitioner contends (Br. 16-17) that the term "age" in Section 623(a)(1) actually means "old age." But the original and primary meaning of age is not old age, but the length of time that a person has lived.[1] Old age is a secondary meaning of age,

[1] *Webster's Third New International Dictionary* 40 (1993) ("1a(1). the length of time during which a being or thing has lived or existed"); *id.* at 17a (first definition is the one known to have been first used in English); *The American Heritage Dictionary* 33 (3d ed. 1992) ("1. The length of time that one has existed"); *id.* at xxxix (the first definition conveys the central meaning); *The Oxford American Dictionary and Language Guide* 18 (1999) ("1a. the length of time that a person or thing has existed or is likely to exist"); *id.* at How to Use the Dictionary, n.6 (the first definition is the most important); *Black's Law Dictionary* 57 (5th ed. 1979) ("The length of time during which a person has lived"). *The Random House Dictionary of the English Language*, 27 (1967) ("1. the length of time during which a being or thing has existed"); *id.* at A Guide to the Dictionary, xxix, V. Definitions (the most frequently encountered meaning appears as the first definition).

and one that usually can be discerned from immediate context, as in "hair white with age," "the infirmity of age," or "age cannot wither her."[2] There is nothing comparable in the immediate context of Section 623(a)(1) suggesting that Congress intended for the term "age" to have that special meaning instead of its original and primary meaning. See *Muscarello* v. *United States*, 524 U.S. 125, 128-132 (1998) (finding no evidence that Congress intended to depart from the "ordinary meaning" of the term "carry").

2. Moreover, the larger context of the ADEA makes clear that Congress used the term "age" to mean the length of time a person has lived, and not old age. Indeed, the ADEA can function coherently only if age is given its primary meaning throughout the statute. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (court must interpret statute as a "coherent" and "harmonious" whole); see also *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

[2] *The American Heritage Dictionary*, *supra*, at 33 ("4. The state of being old; old age: *hair white with age*"); *The Oxford American Dictionary*, *supra*, at 18 ("3. the latter part of life; old age (*the infirmity of age*)"); *Webster's Third New International Dictionary*, *supra*, at 40 ("1e(1) an advanced stage of life: the latter part of life: (the feebleness of [age]); 1e(2) the quality or state of being old; old age: ([age] cannot wither her)"); *Black's Law Dictionary*, *supra*, at 57 (not listing old age as a definition of age, but defining "aged person" as "[o]ne advanced in years"); *The Random House Dictionary*, *supra*, at 27 ("6. advanced years; old age: *His eyes were dim with age.*").

a. The ADEA's advertising prohibition makes it unlawful for an employer to place an advertisement relating to employment "indicating any preference, limitation, specification, or discrimination, based on age." 29 U.S.C. 623(e). The purpose of that prohibition is to reinforce the ADEA's basic prohibition by barring an employer from advertising employment preferences that are unlawful under Section 623(a). See *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 388-389 (1973) (upholding analogous state ban on advertising illegal preferences based on sex against a First Amendment challenge).

Petitioner's interpretation of the term "age," however, would break the link between the advertising prohibition in Section 623(e) and the illegal conduct prohibition in Section 623(a)(1). Under petitioner's view that age means "old age," an employer clearly would be forbidden by Section 623(e) from publishing an advertisement "indicating" a hiring "preference" based on "old age." Yet, despite the prohibition on advertisements favoring relatively older workers, the employer would be free under Section 621(a)(1) to commit the very discriminatory act that it could not advertise. For example, an employer would be barred by Section 623(e) from placing an advertisement seeking applications from workers "55 and over" for particular positions, but the employer would be free under Section 623(a)(1) to have a policy of hiring only workers who are "55 and over" for those very positions. Congress could not have intended to enact such an inexplicable scheme.

When age is given its original and primary meaning, the basic prohibition and the advertising prohibition work together harmoniously. An employer may neither place an advertisement seeking only workers 55 and over for particular positions, nor adopt a policy of hiring only workers 55 and over for those positions. Conversely, an employer may neither place an advertisement seeking only workers under

55 for particular positions, nor establish a policy of hiring only workers under 55 for those positions.

b. Petitioner's interpretation would also disrupt the relationship between the ADEA's basic prohibition and its bona fide occupational qualification (BFOQ) defense. The BFOQ defense, 29 U.S.C. 623(f)(1), provides that it is not unlawful for an employer to take any action that is "otherwise prohibited" by Section 623(a)(1) "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." The purpose of the BFOQ defense is to permit an employer to engage in age-based employment practices that would otherwise violate Section 623(a) when it can satisfy Section 623(f)(1)'s stringent BFOQ standard. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412, 414-417 (1985).

Under petitioner's view that "age" means "old age," however, an employer could invoke the BFOQ defense only when "old age" is a BFOQ. It would be unable to invoke the BFOQ defense to justify a preference for persons *under* a certain age even if it could show that such a preference is "reasonably necessary to the normal operation" of its business. 29 U.S.C. 623(f). For instance, an employer could not justify as a BFOQ a refusal to consider workers in the protected class for theatrical roles as teenagers or young adults. Congress could not have intended that result. Indeed, this Court has already held in *Criswell* that an employer may establish a preference for workers under a certain age when reasonably necessary for the normal operation of the business. 472 U.S. at 414.

Petitioner's interpretation would not only prevent the BFOQ defense from operating in accordance with Congress's intent; it would render it a nullity. An employer could invoke the BFOQ defense *only* to demonstrate that older age is a BFOQ, but it would *never* need to do that since, under petitioner's interpretation, a preference for older

workers does not violate the ADEA's basic prohibition in the first place.

Those anomalies disappear and the statue operates harmoniously when age is given its ordinary meaning throughout the statute. Section 623(a)(1) generally protects any individual who is at least 40 from discrimination based on age, regardless of whether the person so preferred is older or younger. At the same time, under Section 623(f)(1)'s BFOQ standard, an employer may adopt a preference for persons over a certain age and for persons under a certain age when it can show that the preference is reasonably necessary to the normal operation of its business.

3. Significantly, if Congress had intended to limit the scope of the ADEA to discrimination based on a protected class member's older age, it could have expressed that intent directly by adding a single word to the statute. Rather than prohibiting discrimination against a protected individual "because of such individual's age," Congress could have instead prohibited discrimination against a protected individual "because of such individual's *older* age." This Court has attached importance to Congress's failure to insert a single word into a statutory prohibition in similar circumstances. See *United States* v. *Turkette*, 452 U.S. 576, 581 (1981) (refusing to hold that the enterprises subject to the RICO statute are limited to legitimate enterprises on the ground that Congress "could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate'").

Congress's failure to insert the word "older" into Section 623(a)(1) is particularly revealing because Congress has demonstrated that it is capable of drawing a distinction between older and younger workers by adding, *inter alia*, the word "older" when it wishes to do so. Section 623(f)(2)(B)(i) provides an affirmative defense by allowing an employer to take action that would otherwise be prohibited by the ADEA "to observe the terms of a bona fide employee

benefit plan—(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an *older worker* is no less than that made or incurred on behalf of a *younger worker*, as permissible under section 1625.10, title 29, Code of Federal Regulations." 29 U.S.C. 623(f)(2)(B)(i) (emphasis added). Congress's failure to draw a similar distinction in the ADEA's basic prohibition shows that no such distinction was intended.

4. The pension eligibility defense in the ADEA, 29 U.S.C. 623(*l*), reinforces that conclusion. Section 623(*l*) specifies that it is not unlawful when "an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a *minimum age* as a condition of eligibility for normal or early retirement benefits." 29 U.S.C. 623(*l*)(1)(A) (emphasis added).

The most logical explanation for Section 623(*l*), which was added to the ADEA in 1990, is that Section 623(a)(1) generally prohibits discrimination against members of the protected class because of age, without regard to whether the distinction favors relatively younger or older protected workers, making it necessary to carve out an exception from that general prohibition for pension plans that set a minimum age as a condition of eligibility. Under petitioner's alternative view that the basic prohibition permits an employer to favor older over younger protected workers, Congress' effort to add Section 623(*l*) to the statute would be superfluous. See *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) (Congress ordinarily does not enact superfluous provisions).

5. In sum, viewing the ADEA's substantive provisions as a whole, Congress used the term age to refer to the length of time a person has lived, not old age. The ADEA therefore generally prohibits an employer from favoring older over younger protected workers because of age when it comes to advertising, hiring, promotion, and firing. To justify such a

preference, an employer must satisfy one of the ADEA's affirmative defenses, at least two of which specifically address benefit plans.

B. Other Sources Of Legislative Intent Confirm That The ADEA Generally Prohibits An Employer From Favoring Older Over Younger Protected Workers

Petitioner contends (Br. 18-28) that the ADEA's statement of findings and purpose, its extension of protection only to individuals who are at least 40, and its legislative history show that the ADEA prohibits only discrimination against an individual based on his old age. In fact, however, those sources confirm that the ADEA prohibits all discrimination against protected workers based on age, not just discrimination based on old age.

1. a. Congress's statement of findings and purpose are fully consistent with the conclusion that the ADEA prohibits an employer from favoring older over younger protected workers because of age. For example, one congressional finding was that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." 29 U.S.C. 621(a)(1). For a 42-year-old employee who is fired because of his age and must seek new employment, it does not matter whether he was replaced by a 30-year-old or a 50-year-old employee. In either case, as an older worker, he may encounter great difficulty in finding a new job. Protection of that individual from either form of age discrimination is therefore consistent with one of Congress's reasons for enacting the ADEA.

The same is true with respect to Congress's stated purposes for the ADEA. Those purposes are "to promote employment of older persons *based on their ability* rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of *meeting*

problems arising from the impact of age on employment. 29 U.S.C. 621(b) (emphasis added). To accomplish those objectives, it is not enough to protect relatively older workers from policies favoring relatively younger employees. Rather, age must generally be taken off the table as a relevant factor, except when affirmative defenses, such as the BFOQ provision, allow an employer to justify consideration of age. As Judge Cole explained in his concurring opinion in this case, when a 42-year-old loses his job and is replaced by a 50-year-old based on nothing more than age, that termination is not based on "ability"; it reflects "arbitrary age discrimination in employment"; and it is not a solution to the "problems arising out of the impact of age on employment." Pet. App. 14a-15a.

b. Contrary to petitioner's contention (Br. 18-19), Congress's references in the statement of findings and purpose to protecting "older workers" does not indicate that Congress intended to prohibit only discrimination based on older age. 29 U.S.C. 621. Under the ADEA, the "older workers" that Congress sought to protect against age discrimination are "individuals who are at least 40 years of age." 29 U.S.C. 631.

More fundamentally, while a statement of findings and purpose may reveal the principal concerns that animate legislation, they do not alter the scope of a law's substantive prohibitions. See *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260 (1994) (RICO finding does not alter the scope of the RICO statute). As this Court has explained, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); see *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989) (The occasion for enactment of the RICO

statute "was the perceived need to combat organized crime," but Congress "chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.").

Oncale itself is a dramatic illustration of that point. In that case, the Court held that male-on-male sexual harassment violates Title VII of the Civil Rights Act of 1964. In enacting Title VII, Congress was principally concerned about employment discrimination directed against racial minorities and women; its principal concern was "assuredly not" discrimination against men, much less discrimination that took the form of male-on-male sexual harassment. *Oncale*, 523 U.S. at 79. The *Oncale* Court nonetheless concluded that such discrimination violates Title VII because the text of Title VII broadly applies to all employment practices that discriminate against an individual because of such individual's sex. *Id.* at 79-80. Similarly, in *McDonald* v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court held that Title VII protects whites from racial discrimination in employment, even though discrimination against racial minorities animated Title VII's prohibition against discrimination based on race. *Id.* at 278-280.

Oncale and *McDonald* are particularly instructive in this case because Congress modeled the ADEA's substantive prohibitions on Title VII's substantive prohibitions. Indeed, the substantive prohibitions are almost identical. Compare 29 U.S.C. 623(a)(1) (making it unlawful for an employer to "discriminate against any individual * * * because of such individual's age") with 42 U.S.C. 2000e-2(a)(1) (making it unlawful for an employer to "discriminate against any individual * * * because of such individual's race, color, religion, sex, or national origin"). It is therefore hardly surprising that Congress's prohibition in the ADEA sweeps more broadly than the immediate problem that animated enactment of the law. Just as Congress in Title VII enacted

a prohibition that protects any individual against discrimination because of race and sex, even though the principal problem that Congress sought to redress was discrimination based on a person's minority race and female sex, Congress in the ADEA enacted a prohibition that protects any individual in the protected class against discrimination because of age, even though the principal problem that Congress sought to redress was discrimination directed at individuals based on their older age.

2. Petitioner errs in contending (Br. 16) that Congress's decision to limit the ADEA's protections to persons who are at least 40 "refutes the notion that the Act forbids discrimination against younger individuals in favor of older workers." Rather, it shows only that Congress chose not to prohibit discrimination because of an individual's age *when the aggrieved worker is under 40.* Because Congress concluded that workers who are under 40, as a class, do not face the same difficulties in the workplace, or the same difficulties in regaining employment, as workers who are at least 40, Congress extended no protection to them. With respect to the group to which it did extend protection, however, Congress enacted a broad prohibition against any discrimination based on age, not just discrimination based on older age. Cf. *O'Connor* v. *Consolidated Coins Caterers Corp.*, 517 U.S. 308, 312 (1996) (noting that the ADEA "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older").

Nor is there anything "absurd" (Pet. Br. 23) about permitting a 40-year-old, but not a 39-year-old, to challenge a preference for a 50-year-old that is based on age. That difference is a function of Congress having chosen to protect persons who are 40, but not persons who are 39, from arbitrary age discrimination. For example, there is no question

that an individual who is 40 may sue under the ADEA when he is replaced by someone who is 30, but that a 39-year-old who is replaced by the same 30-year-old may not. For the same reason, an individual who is 40 may sue to challenge a preference for someone who is 50, but a person who is 39 may not. Although in both situations, the 39-year-old and 40-year-old may be aggrieved by arbitrary consideration of age, Congress rationally decided that, because persons 40 and over as a class have greater difficulty in finding re-employment than persons under 40 as a class, protection should be extended only to those 40 and over.

3. The legislative history also supports the conclusion that the ADEA generally prohibits an employer from discriminating between protected workers on the basis of age. In a separate statement attached to the Senate Report, Senator Dominic raised a question concerning whether an employer would be open to a charge of discrimination if he hired a 42-year-old over a 62-year-old or a 62-year-old over a 42-year-old. S. Rep. No. 723, 90th Cong., 1st Sess. 15 (1967). Senator Dominic noted that one committee counsel had stated that neither may sue, while another counsel had stated that both may sue. *Id.* at 16.

Senators Javits and Yarborough, two of the Act's principal sponsors, then engaged in a colloquy on the floor of the Senate to clarify that the ADEA *would prohibit either action* if taken on the basis of age. Senator Javits began the exchange as follows:

> The Senator from Colorado, in his individual views, has raised the possibility that the bill might not forbid discrimination between two persons each of whom would be between the ages of 40 and 65. As I understand it, that is not the intent of the legislation. I do not think any such reading is justified by the terms of the bill. I think we should nail this down. Section 4 of the bill specifically

> prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job, and the employer selected the man age 42 solely * * * because he is younger than the man 52, then [the employer] will have violated the act. * * * Would the Senator from Texas be kind enough to advise the Senate whether he agrees with that interpretation of the bill?

113 Cong. Rec. 31,255 (1967).

Senator Yarborough, the floor manager of the bill, then responded as follows:

> I am glad that the Senator from New York has bought this question up for clarification. This matter was discussed in committee, but it was discussed in executive session. I think we should clarify this in the Congressional Record. It was not the intent of the sponsors of this legislation * * * to permit discrimination in employment on account of age, whether discrimination might be attempted between a man 38 and one 52 years of age, or between one 42 and one 52 years of age. *If two men applied for employment under the terms of this law, and one was 42 and one was 52, * * * [the] employer * * * could not turn either one down on the basis of the age factor. * * * The law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way his decision went.*

113 Cong. Rec. at 31,255 (emphasis added). While the stray remarks of a single representative are not controlling, those considered statements by the bill's sponsors are entitled to significant weight. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982).

C. Petitioner's Reliance On *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), Is Misplaced

Petitioner contends (Br. 29-30) that *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), shows that the ADEA prohibits only discrimination based on older age. *O'Connor*, however, does no such thing.

In *O'Connor*, a plaintiff alleged that he was dismissed because of age. In support of that claim, he produced evidence that he was replaced by a younger worker who was over 40. The Fourth Circuit dismissed the plaintiff's claim, holding that an ADEA plaintiff can establish a prima facie case under the framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), only when he can show that he was replaced by someone outside the protected class. This Court reversed, holding that, under the text of the ADEA, "[t]he fact that one person in the protected class has lost out to another person in the protected class is * * * irrelevant, so long as he has lost out *because of his age*. 517 U.S. at 312 (emphasis in original). The Court went on to hold that a prima facie case requires evidence that raises an inference of discrimination based on age and that "such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger." *Id.* at 313. The Court explained that "[b]ecause the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Ibid.*

Petitioner argues (Br. 29) that *O'Connor* is controlling here because a person claiming that he has been treated less favorably than an older worker obviously cannot show that he has been treated less favorably than someone who is substantially younger. *O'Connor*, however, only addressed

what evidence is sufficient to establish a prima facie case *where the plaintiff's claim is that his employer discriminated against him in favor of a younger worker.* In that circumstance, a plaintiff proceeding under *McDonnell Douglas* must show that someone substantially younger was given more favorable treatment. *O'Connor* did not address whether a person in the protected class can state a claim under the ADEA by showing that someone older was given more favorable treatment on the basis of age.

The Court's decision in *McDonald* v. *Sante Fe* provides a striking parallel. Before *McDonald*, the Court in *McDonnell Douglas* had described the elements of a prima facie case under Title VII to include proof that the plaintiff "belongs to a racial minority." 411 U.S. at 802. In *McDonald*, the Court saw no inconsistency between that holding and its conclusion that Title VII prohibits racial discrimination in employment against whites as well. 427 U.S. at 279 n.6. The Court explained that *McDonnell Douglas*'s requirement that a plaintiff show that he belongs to a racial minority "was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination." *Ibid.*

The situation is the same here. *O'Connor* devised the "substantially younger" requirement for the most common kind of ADEA case and the kind of case at issue there—one where the plaintiff alleges discrimination based on his older age. *O'Connor* does not establish any substantive limitation on the ADEA's general prohibition against age discrimination directed at persons who are at least 40 years of age. In any event, because *O'Connor* addressed only the nature of the evidence necessary to prove a violation through circumstantial evidence under the *McDonnell Douglas* framework, *O'Connor*'s proof requirement has no application where, as here, an employer's policy facially discriminates on the basis

of age. See *TWA* v. *Thurston*, 469 U.S. 111, 121 (1985) ("the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination").

Indeed, far from supporting petitioner, *O'Connor* reinforces that the ADEA prohibits all discrimination against protected workers because of age because *O'Connor* rejected the one argument that led some legislators to question whether the ADEA protected a 42-year old against age-based discrimination in favor of a 62-year-old. As described above (pp. 18-19, *supra*), Senator Dominic's concern was that neither the 42-year-old nor the 62-year-old could sue if they suffered age-discrimination vis-a-vis the other because they were both in the protected class. The colloquy between Senators Javits and Yarborough made clear that *both* could sue, and *O'Connor* verifies that conclusion by emphasizing that it is "irrelevant" whether the plaintiff "lost out to another person in the protected class," if "he has lost out *because of age*." 517 U.S. at 312.

D. The ADEA's General Prohibition Against Age Discrimination Does Not Endanger Bona Fide Benefit Plans That Favor Older Over Younger Protected Workers As Long As They Satisfy The Requirements of 29 U.S.C. 623(f)(2)(B)(i)

1. Petitioner contends (Br. 40-41) that, if Section 623(a)(1) prohibits an employer from favoring older over younger protected employees, it would endanger minimum age retiree health benefit plans that are "virtually ubiquitous" among employers. That argument ignores the effect of 29 U.S.C. 623(f)(2)(B)(i).

As amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978, Section 623(f)(2)(B)(i) provides that it shall not be unlawful for an employer "to observe the terms of a bona fide employee benefit plan—(i) where, for each benefit or benefit package,

the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations." 29 U.S.C. 623(f)(2)(B)(i). In addition, the plan may not "require or permit the involuntary retirement of any [protected] individual." 29 U.S.C. 623(f)(2)(B) (proviso). The employer has the burden of proving that a plan satisfies those requirements. 29 U.S.C. 623(f)(2).

The text of Section 623(f)(2)(B)(i) establishes five basic requirements: (1) the employer's action must be taken pursuant to a "benefit plan"; (2) the benefit plan must be "bona fide"; (3) the employer must "observe" the plan; (4) the payment made or cost incurred on behalf of an older worker must be "no less than" that made or incurred on behalf of a younger worker; and (5) the plan may not "require or permit" involuntary retirement of a protected worker. Section 623(f)(2)(B)(i) incorporates the explanation of those requirements from the EEOC's preexisting regulation on benefit plans, which interpreted the original Section 623(f)(2). As long as the statutory requirements are satisfied in the manner set out in the EEOC's regulation, an employer may take action that is "otherwise prohibited" by the ADEA. 29 U.S.C. 623(f)(2). Thus, while Section 623(a)(1) generally prohibits an employer from providing a different level of benefits to protected individuals because of their age, Section 623(f)(2)(B)(i) permits an employer to engage in such discrimination when its specific requirements are satisfied.

By providing that the payment made or cost incurred on behalf of older workers must be "*no less than*" that incurred on behalf of younger workers, Section 623(f)(2)(B)(i) deliberately departs from the EEOC's preexisting regulation which had specified that an employer would have a defense "where the actual amount of payment made, or cost incurred, in

behalf of an older worker *is equal to* that made or incurred in behalf of a younger worker." 29 C.F.R. 1625.10 (1988) (emphasis added). That change makes clear that an employer that otherwise satisfies the provision's preconditions may make *greater* payments and incur *greater* costs on behalf of older workers than younger workers in the protected class. Furthermore, Section 623(f)(2)(B)(i) does not require as a precondition that the employer provide equal benefits to older and younger protected employees. Nor is such a condition contained within the five basic requirements. Indeed, the affirmative defense is triggered only when there is a disparity in benefits that would otherwise trigger the ADEA's basic prohibition of age discrimination. Accordingly, an employer that satisfies the five basic requirements is free to provide *greater benefits* to older workers in the protected class, even though such a practice would be "otherwise prohibited" by the ADEA. 29 U.S.C. 623(f)(2).

The legislative history confirms that understanding. The EEOC's then-General Counsel, Charles Shanor, testified in hearings before the Senate that the proposed amendment permits "an older employee to receive greater benefits or an employer to incur greater costs for an older than for a younger employee." *Older Workers Benefit Protection Act: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and Special Comm. on Aging*, 101st Cong., 1st Sess. 62 (1989); see *id.* at 67. Shanor adverted to an EEOC regulation "which permits the extension of additional benefits to older workers to counteract problems of age discrimination," and explained that the amendment "simplifies" that regulation. *Id.* at 456. See 29 C.F.R. 1625.2(b); note 4, *infra*. Shanor gave substantially the same testimony to the House. *Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision: Joint Hearing Before House Select Comm. on*

Aging and the Subcomms. on Employment Opportunities and Labor-Management Relations of the Comm. on Education and Labor, 101st Cong., 1st Sess. 59, 64, 77 (1989). Thus, as long as the requirements in Section 623(f)(2)(B)(i) are satisfied, retiree health benefit plans that provide greater benefits to older than to younger protected workers do not violate the ADEA.

2. Ultimately, petitioner recognizes that a holding that the ADEA generally prohibits an employer from favoring older over younger protected workers does not endanger prevalent forms of retiree health benefit plans because it argues (Br. 36-38) that its own plan is protected by Section 4(f)(2)(B)(i). Petitioner, however, did not raise that issue in its motion to dismiss before the district court. Nor did it raise that issue on appeal. Accordingly, neither the district court nor the court of appeals resolved that issue. Because petitioner did not raise that issue in its motion to dismiss or on appeal, and because neither court resolved the issue, that question is not properly presented here. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001). Review of that issue is particularly unwarranted here, because Section 623(f)(2)(B)(i) is an affirmative defense on which the employer has the burden of proof, and evidence has not yet been directed to the question whether the preconditions of that defense have been satisfied.

That does not mean that petitioner is foreclosed from raising that issue in this litigation. After the court of appeals issued its decision, petitioner filed an answer in the district court in which it asserted Section 623(f)(2)(B)(i) as an affirmative defense. The district court is the proper forum for resolving the issue in the first instance.[3]

---

[3] Petitioner asserts (Br. 45) that employers favor older over younger employees in the protected group infrequently. There is some tension between that statement and petitioner's assertion that benefit plans that favor older workers in the protected group are "virtually ubiquitous."

E. The EEOC Has Interpreted The ADEA To Prohibit An Employer From Favoring Older Over Younger Protected Workers, And Its Interpretation Warrants Deference

For the reasons discussed above, it is clear that the ADEA generally bars an employer from favoring older over younger protected workers. If the Court were to conclude that Congress did not resolve that question conclusively, however, it should defer to the EEOC's authoritative determination that the ADEA generally bars such discrimination. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Counsel*, 467 U.S. 837, 842-845 (1984) (where Congress has not spoken directly to an issue, courts should defer to agency's construction, provided that the construction is reasonable).

1. The Department of Labor initially had responsibility for enforcement of the ADEA. That responsibility was subsequently transferred to the EEOC, and the EEOC is now the exclusive federal agency responsible for enforcing the ADEA. 29 U.S.C. 625 note, 626. Congress has also delegated to the EEOC authority to promulgate regulations to carry out the purposes of the ADEA. 29 U.S.C. 628.

In 1981, following notice and comment, the EEOC issued an interpretive regulation that provides that it is unlawful for an employer to prefer one worker in the protected group over another in the protected group because of either individual's age. 29 C.F.R. 1625.2(a). The regulation, which

---

Moreover, petitioner appears to suggest (Br. 33-34) that some employers may favor older members of the protected group in layoffs in order to minimize the chance that older workers will challenge the layoffs under the ADEA. Ultimately, however, the question is not whether discrimination that favors older over younger workers in the protected class is frequent, but whether it is prohibited by the ADEA. *Cf. Oncale*, 523 U.S. at 79. For the reasons discussed in this brief, the ADEA prohibits such discrimination unless one of the Act's affirmative defenses applies.

tracks a similar regulation issued by the Department of Labor in 1968 (29 C.F.R. 860.91), provides that:

> It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.[4]

The EEOC has also applied its regulation in a legally binding and precedential federal sector adjudication. *Garrett* v. *Runyon*, No. 01960422, 1997 WL 574739 (Sept. 5, 1997), aff'd in relevant part on reconsideration, No. 01960422, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999). In *Garrett*, the EEOC held that the United States Postal Service could not use "earliest date of birth" as a tie-breaker when determining seniority for purposes of assigning rural carrier routes. *Ibid.* See 29 U.S.C. 633a(a) (prohibiting age discrimination by federal agencies); 29 U.S.C. 633a(b) (giving EEOC authority to enforce the federal sector prohibition through appropriate remedies).[5]

---

[4] The EEOC's regulation creates an exception to that general prohibition. Under that exception, "[t]he extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful" when the employer "has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination," provided the extension of additional benefits is not used as a means to commit other forms of discrimination outside the context of benefits. 29 CFR 1625.2(b). Because petitioner did not rely on that exception in its motion to dismiss or on appeal, and because neither court below addressed it, that exception is not at issue here.

[5] Three other federal sector decisions that predated *Garrett* contain statements that the ADEA does not prohibit treating younger workers in the protected class less favorably than older protected workers. *Isabella* v. *Runyon*, No. 01944083, 1995 WL 653513 (E.E.O.C. Oct. 19, 1995);

For the reasons discussed in this brief, "the EEOC's interpretation is a true rendering of the language" (Pet. App. 10a) and accurately reflects Congress's clearly expressed intent. At the very least, however, the EEOC's construction of the ADEA is reasonable. Accordingly, if the Court concludes that the relevant sources of legislative intent do not conclusively resolve the issue, it should defer to the EEOC's longstanding construction under *Chevron*.

2. Petitioner contends (Br. 39) that the EEOC's interpretation does not qualify for *Chevron* deference, but should instead be examined under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). That contention is incorrect. The EEOC has authority to enforce the ADEA and to issue regulations

---

DuPriest v. *Bentsen*, No. 01942145, 1994 WL 1755951 (E.E.O.C. May 2, 1994); *Burt* v. *Bentsen*, No. 01942163, 1994 WL 735377 (E.E.O.C. Apr. 29, 1994). Because those decisions were not circulated to the Commission, their reasoning lacks precedential value. The results in those cases are independently justified because all involved challenges to the use of a minimum age as a condition of early retirement programs, and the ADEA does not bar that practice. See 29 U.S.C. 623(*l*)(1)(A) (minimum age for eligibility for normal or early retirement benefits is not a violation of the ADEA). An early Department of Labor (DOL) opinion letter concluded that the ADEA prohibited an employer from reserving certain positions for persons over the age of 50. The letter disapproved that practice on the ground that it "could be taken as a precedent for giving older workers certain jobs at lesser rates of pay simply to keep them employed, or could be interpreted as a preference for one group of older workers (that is, those over 50) over another group (those 40 to 50 who are also entitled to the protection of the law)." Letter WH-30, 1970 WL 26398 (May 1, 1970). Another early DOL letter took the same position. Letter WH-36, 1970 WL 26404 (May 25, 1970). Three later letters approved extending more favorable treatment to older workers in the protected group. Letter WH-389, 1976 WL 41742 (June 25, 1976) (contractual provision extending preference to persons 55 and older); Letter WH-404, 1976 WL 41753 (Aug. 26, 1976) (contractual provision reserving every fifth journeyman position to persons 55 and older); Letter WH-451, 1978 WL 51448 (Jan. 31, 1978) (plan providing greater severance pay to older workers). Those letters stated that DOL's interpretive regulation prohibiting such discrimination would be amended, but such an amendment never occurred.

to carry out its purpose; it issued its interpretation after notice and comment; it framed its regulation as a mandatory legal duty; it applied the regulation in a legally binding adjudication that has precedential force; and its interpretation is consistent with the Department of Labor's initial interpretation of the ADEA in 1968. In those circumstances, the EEOC's interpretation is entitled to *Chevron* deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001); see *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 84-87 (2002) (deferring to an EEOC regulation); Barnhart v. *Walton*, 535 U.S. 212, 221-222 (2002); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996).

This case, however, does not require the Court to decide whether the EEOC's interpretation is entitled to *Chevron* or *Skidmore* deference. The text and structure of the ADEA make clear that it generally bars an employer from favoring older over younger protected workers, and that an employer seeking to engage in such discrimination must rely on one of the ADEA's affirmative defenses. The EEOC's longstanding interpretation both reflects and supports that conclusion. Cf. *Edelman* v. *Lynchburg College*, 535 U.S. 106, 114 (2002) (declining to fix the precise level of deference because EEOC's interpretation was "not only a reasonable one," but the correct one).

* * *

As the text makes plain, the ADEA prohibits discrimination because of age. The Act prohibits discrimination even if "one person in the protected class has lost out to another person in the protected class," and without regard to whether the one who lost out is the older or younger of the two, "so long as he lost out *because of age*." *O'Connor*, 517 U.S. at 312. The basic prohibition generally precludes consideration of age in advertising, hiring, promotion, and firing and promotes the evaluation of candidates on the basis of

abilities, rather than age. When it comes to benefits, however, affirmative defenses allow employers to provide additional benefits to members who have reached a certain age as long as certain conditions are met. Accordingly, there is no reason to read the ADEA as indifferent to discrimination because of age when an employer favors older workers. The ADEA, as a whole, both generally prohibits discrimination because of age, while specifically addressing the case of benefits.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General**
IRVING L. GORNSTEIN
Assistant to the Solicitor General

ERIC S. DREIBAND
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
LORRAINE C. DAVIS
Assistant General Counsel
ROBERT J. GREGORY
Senior Attorney
SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission

AUGUST 2003

---

* The Solicitor General is recused from this case.

APPENDIX

1. 29 U.S.C. 621 provides:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

2. 29 U.S.C. 623 provides in pertinent part:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * * * *

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitaion, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably neces-

sary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

* * * * *

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause

(i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter;

* * * * *

(*l*) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits;

* * * * *

3. 29 U.S.C. 628 provides:

§ 628 Rules and regulations, exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and it may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

* * * * *

4. 29 U.S.C. 631 provides:

§ 631 Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

* * * * *